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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* EDWARD DEWEY SMITH III, SHAWN DAVID  
MCCONAUGHY, JIANJUN JUSTIN LI, and  
MARC ADAM FLICKINGER

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Appeal 2019-002186  
Application 15/135,627  
Technology Center 1700

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Before ROMULO H. DELMENDO, JULIA HEANEY, and LILAN REN,  
*Administrative Patent Judges.*

HEANEY, *Administrative Patent Judge.*

DECISION ON APPEAL

## STATEMENT OF THE CASE<sup>1</sup>

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> appeals from the Examiner's decision to reject claims 1–25. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

## CLAIMED SUBJECT MATTER

The claimed subject matter relates to a perfumed rinse-off cleansing composition. Appeal Br. 1. According to Appellant, most perfume in cleansing compositions is washed away during rinsing and the skin retains no or very little scent and only for a short duration after cleaning. Spec. 5:2–5. Appellant seeks to improve perfume retention on the skin by providing perfume in a microemulsion comprising a surfactant and a hydric solvent. *Id.* at 6:15–7:6. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A rinse-off cleansing composition, comprising:
  - a) from about 35% to about 85%, by weight of the composition, of surfactant;
  - b) from about 4% to about 30%, by weight of the composition, of a perfume, wherein the weight percent

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<sup>1</sup> In this Decision, we refer to the Specification dated April 22, 2016 (“Spec”), the Final Office Action dated March 15, 2018 (“Final Act.”), the Appeal Brief dated Aug. 14, 2018 (“Appeal Br.”), the Examiner’s Answer dated November 19, 2018 (“Ans.”), and the Reply Brief dated January 17, 2019 (“Reply Br.”).

<sup>2</sup> 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 Proceter & Gamble Company. Appeal Br. 1.

of perfume is from about 8% to about 90%, by weight of the surfactant;

- c) from about 6% to about 20%, by weight of the composition, of a solvent, wherein at least 5% of the solvent, by weight of the composition, comprises a hydric solvent and wherein the weight percent of the hydric solvent is from about 7% to about 60%, by weight of the surfactant; and
- d) from about 2% to about 57%, by weight of the composition, of water;

wherein the rinse-off cleansing composition has a G' at about 1 Hz of about 25 Pa to about 3000 Pa; wherein said composition provides enhanced initial perfume perception, perfume bloom and perfume retention on the skin.

Appeal Br. 8 (Claims Appendix).

#### REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Frantz	US 2003/0180246 A1	Sept. 25, 2003
Taylor	US 2012/0015009 A9	Jan. 19, 2012

#### REJECTION

The Examiner maintains the rejection of claims 1–25 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Taylor in view of Frantz. Final Act. 2.

## OPINION

We review the appealed rejections for error based upon the issues identified by Appellant and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential), *cited with approval in In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”). After considering the evidence presented and each of Appellant’s arguments in this appeal, we are not persuaded that Appellant identifies reversible error. Thus, we affirm the Examiner’s rejections for the reasons expressed in the Final Office Action and the Answer. We add the following primarily for emphasis.

Appellant argues all claims as a group. *See* Appeal Br. 3–6. Therefore, consistent with the provisions of 37 C.F.R. § 41.37(c)(1)(iv) (2013), we limit our discussion to claim 1, and all other claims on appeal stand or fall together with claim 1.

The Examiner finds that Taylor teaches a multi-phase personal cleansing composition that may be a rinse-off composition, comprising at least 0.40% by weight of a blooming perfume, 0–80% of solvents such as dipropylene glycols, 30–90% by weight of water or aqueous phase, and 2–40% of a surfactant. Final Act. 2 (citing Taylor abstract, ¶¶ 15–17, 19, 30–31, 38–41, 52). The Examiner finds that Taylor does not specifically teach the percentage by weight of the composition of perfume, or the percentage by weight of the composition of solvent, as recited in appealed claim 1. *Id.* at 2–3. The Examiner finds that a person of ordinary skill in the art would have optimized Taylor’s proportions in order to reach the claimed percentage range of perfume in the composition. *Id.*

The Examiner finds that Frantz teaches aqueous personal cleansing formulations comprising surfactants, thickening agents, perfumes, and humectants such as dipropylene glycol. *Id.* at 3 (citing Frantz). The Examiner finds that Frantz teaches using dipropylene glycol at levels up to 10% of the composition (citing Frantz ¶ 83), and that a person of ordinary skill in the art would have been able to optimize the amount of dipropylene glycol in order to reach the claimed percentage range of solvent. *Id.* at 4.

Appellant argues that Taylor teaches levels of perfume that are well below the lowest level of perfume recited in claim 1. Appeal Br. 3. Similarly, Appellant argues that it is impossible to tell from Taylor's examples how much perfume is in the final composition. *Id.* This argument does not persuasively identify error because the Examiner's rejection is based on a person of ordinary skill in the art optimizing the percentage of perfume taught in Taylor, which teaches that its composition comprises at least 0.40% by weight of blooming perfume ingredients, without an upper limit. Taylor ¶ 19. Appellant does not dispute this teaching, or point to evidence of record to show that the claimed percentage levels of perfume are critical.

Appellant further argues that the Examiner fails to show a teaching in Taylor of 6% to 20% solvent, at least 5% of which is hydric, or weight percentage of hydric solvent by weight of surfactant (as recited in appealed claim 1) or the weight percentage of dipropylene glycol (as recited in appealed claims 21 and 25). Appeal Br. 4. This argument does not persuasively identify error because the Examiner's rejection is based on Frantz's teaching of dipropylene glycol used as a humectant at concentration levels up to 10%. Ans. 7 (citing Frantz ¶ 83). The Examiner reasons that a

person of ordinary skill in the art would have been motivated to adjust the dipropylene glycol solvent in Taylor's composition to the amount taught by Frantz, in view of the benefit of humectants taught by Frantz, and in order to optimize the amount of solvent in Taylor. *Id.* at 7–8. Based on the preponderance of the evidence, we agree with the Examiner's rationale as to why a person of ordinary skill in the art would have combined the teachings of Taylor and Frantz. Further, Appellant's argument that there is nothing in Frantz to overcome the lack of teaching in Taylor with respect to perfume levels, hydric solvent by weight of surfactant, or G' levels is not persuasive because it attacks the references individually when the rejection is based on a combination of the references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

We have also considered Appellant's argument that Taylor is not relevant prior art for the problem solved by the claimed subject matter, because "Appellant was looking to formulate a composition which . . . could provide a residual scent on the skin for a while after the application event (like a shower)" while Taylor, in contrast, is directed to a product that leaves little or no residual odor on the skin and hair after the shower. Appeal Br. 5 (citing Taylor ¶ 4). Appellant's argument is not persuasive of reversible error, because Taylor is relevant for all that it reasonably would have suggested to a person of ordinary skill in the art, and Appellant does not dispute that it teaches at least 0.04% by weight of the composition of perfume. To the extent that Appellant is attempting to argue that Taylor teaches away, Appellant does not point to any teaching in Taylor that would discourage increasing the level of perfume to the claimed range, and therefore, Taylor does not teach away from the claimed subject matter.

CONCLUSION

The Examiner's rejection is affirmed.

DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-25	103(a)	Taylor, Frantz	1-25	

AFFIRMED