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EXAMINER

BASQUILL, SEAN M

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSEPH HARRY JANSEN and PAUL ROBERT TANNER

Appeal 2019-005728
Application 14/445,434
Technology Center 1600

Before JEFFREY N. FREDMAN, JOHN G. NEW, and
JAMES A. WORTH, *Administrative Patent Judges*.

FREDMAN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests rehearing of the decision entered June 2, 2020 (“Decision”) that affirmed the Examiner’s obviousness rejection under 35 U.S.C. § 103(a) over Maitra¹ and Rosevear.²

We deny the requested relief.

DISCUSSION

Appellant asserts, regarding our analysis of elements (b)(ii) and (b)(iii) in claim 1, that the “claim interpretation provided in the Decision is contrary to the express disclosure of the specification” (Req. 2). Appellant asserts a “skilled artisan would interpret claim 1(b)(ii) such that the DC9045

¹ Maitra et al., US 2009/0148393 A1, published June 11, 2009.

² Rosevear et al., US 7,172,754 B1, issued Feb. 6, 2007.

material in Example VI of Rosevear is included in the oil phase for purposes of calculating the concentration of liquid UV agent present in the oil phase” (*id.*). Appellant asserts “Rosevear indicates that DC9045 contains silicone elastomer particles swollen in D5 cyclomethicone, and that the amount of crosslinked silicone elastomer in 9040 and 9045 is between 12% and 13%” (*id.*). Appellant concludes that for “purposes of calculating the concentration of the UV agent in the oil phase of Example VI of Rosevear, the DC9045 material should be included in the oil phase or, at a minimum, calculated to add at least 17.4% silicone oil” (*id.* at 3).

We are not persuaded that we overlooked, misapprehended, or erred in our claim interpretation of elements (b)(ii) and (b)(iii) in claim 1. Element (b)(ii) of claim 1 recites “a dispersed oil phase comprising a non-volatile oil comprising a liquid UV agent, wherein the liquid UV agent is present at an amount of at least 50% by weight of the dispersed oil phase” (App. Br. 9). Separately, element (b)(iii) of claim 1 recites “10 to 25%, by weight of substantially spherical particles selected from the group consisting of starch particles, silicone elastomer particles and combinations thereof. . . .” (*id.*).

There is no express recitation that the dispersed oil phase of element (b)(ii) includes a spherical particle of element (b)(iii), or that such a particle is required in element (b)(ii). We therefore did not read such a requirement into claim 1. Our interpretation that element (b)(ii) does not include a spherical particle is reinforced by the Specification, which teaches the “finisher composition is an oil-in-water emulsion comprising a continuous aqueous phase, a dispersed oil phase, and from 10 to 25 wt% of substantially spherical particles” (Spec. 3). Thus, the Specification expressly recognizes

that the oil phase and the spherical particles are different elements, and that the oil phase need not include the spherical particles. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“[A]ppellant’s arguments fail from the outset because . . . they are not based on limitations appearing in the claims.”).

We maintain our position that:

As a matter of claim interpretation, claim 1 differentiates between a “dispersed oil phase” in step (b)(ii) and the spherical particles in step (b)(iii). Because DC 9045 is relied upon for the spherical particle element of step (b)(iii), and Rosevear clearly teaches that DC 9045 is a spherical particle (FF 12), we are not persuaded by Appellant’s attempt to double count DC 9045 as both the oil phase and the spherical particle. Thus, the Examiner’s calculation showing that the ethylhexylmethoxycinnamate UV component at 6% represents more than 50% of the remaining oil phase components including silicone fluid, glycerol monostearate, and DC5225 is persuasive (*see* FF 14).

(Decision 12).

We remain persuaded that our claim interpretation is reasonable in light of claim 1 and the Specification. *See In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) (“[D]uring patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.”)

CONCLUSION

We have reviewed the original opinion in light of Appellant’s request, but we find no point of law or fact which we overlooked or misapprehended in arriving at our decision. Therefore, Appellant’s request is denied with respect to making any modifications to the decision entering a new ground of rejection.

Appeal 2019-005728
Application 14/445,434

Outcome of Decision on Rehearing:

Claim	35 U.S.C. §	Basis	Granted	Denied
1, 20–24, 26	103	Maitra, Rosevear		1, 20–24, 26

Final Outcome of Appeal after Rehearing

Claim	35 U.S.C. §	Basis	Affirmed	Reversed
1, 20–24, 26	103	Maitra, Rosevear	1, 20–24, 26	

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

REHEARING DENIED