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14/819,465	08/06/2015	Karel Jozef Maria DEPOOT	CM4126M	9387

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THE PROCTER & GAMBLE COMPANY
GLOBAL IP SERVICES
CENTRAL BUILDING, C9
ONE PROCTER AND GAMBLE PLAZA
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EXAMINER
DELCOTTO, GREGORY R

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KAREL JOZEF MARIA DEPOOT and
KATRIEN ANDREA LIEVEN VAN ELSEN

Appeal 2019-006859
Application 14/819,465
Technology Center 1700

Before ADRIENE LEPIANE HANLON, CHRISTOPHER C. KENNEDY, and BRIAN D. RANGE, *Administrative Patent Judges.*

RANGE, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision to reject claims 1, 7–14, 16, and 17. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as The Procter & Gamble Company. Appeal Br. 1.

CLAIMED SUBJECT MATTER[2]

Appellant states that laundry unit dose articles (usually water-soluble films containing laundry detergent composition) have become popular with consumers. Spec. 1:7–2:4. Appellant describes the invention as relating to use of freshness actives in the form of perfumes or encapsulated perfumes within a laundry unit dose article. *Id.* Claim 1 is the only independent claim on appeal and is illustrative:

> 1. A water-soluble laundry unit dose article comprising a liquid composition, wherein said composition comprises;
>
> - from about 30 wt% to about 40 wt% of an anionic surfactant, wherein the anionic surfactant comprises linear C11-C18 alkylbenzene sulphonate, C10-C18 alkyl alkoxy sulphates (AE_xS) wherein x is from 1-30, and combinations thereof, and wherein the anionic surfactant further comprises a fatty acid;
> - from about 1 wt% to about 5 wt% of a non-ionic surfactant, wherein the nonionic surfactant comprises a fatty alcohol ethoxylate of formula $R(EO)_n$, wherein R represents an alkyl chain between about 4 and about 30 carbon atoms, (EO) represents one unit of ethylene oxide monomer and n has an average value between about 0.5 and about 20;
> - water;
>
> wherein the weight ratio of total anionic : non-ionic is between about 5:1 and about 9:1; and wherein the composition comprises a perfume and between about 0.1 wt% and about 1 wt% of an encapsulated perfume; and wherein the water-soluble unit dose article comprises at least two compartments and wherein the liquid composition within the water-soluble unit dose article is between about 10 ml and 30 ml.

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[2] In this Decision, we refer to the Final Office Action dated September 11, 2018 ("Final Act."), the Appeal Brief filed March 26, 2019 ("Appeal Br."), and the Examiner's Answer dated July 19, 2019 ("Ans.").

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

Name	**Reference**	**Date**
Briggs et al. ("Briggs")	US 2008/0261850 A1	Oct. 23, 2008
Boutoille et al. ("Boutoille")	US 2009/0312220 A1	Dec. 17, 2009
Menting et al. ("Menting")	US 2010/0313360 A1	Dec. 16, 2010
Labeque et al. ("Labeque")	US 2011/0319311 A1	Dec. 29, 2011

The Examiner uses additional references in making nonstatutory double patenting rejections. Ans. 10–15.

REJECTIONS

The Examiner maintains the following rejections on appeal:

A. Claims 1, 7–14, 16, and 17 under 35 U.S.C. § 112 as failing to comply with the written description requirement. Ans. 3.

B. Claims 1 and 7–14 under 35 U.S.C. § 103 as obvious over Labeque in view of Menting. *Id.* at 4.

C. Claims 1, 11–14, 16, and 17 under 35 U.S.C. § 103 as obvious over Boutoille in view of Labeque. *Id.* at 6.

D. Claims 16 and 17 under 35 U.S.C. § 103 as obvious over Labeque in view of Menting and further in view of Boutoille. *Id.* at 8.

E. Claims 7–10 under 35 U.S.C. § 103 as obvious over Boutoille in view of Labeque and further in view of Briggs. *Id.* at 9.

F. Claims 1, 11–14, 16, and 17 on the ground of nonstatutory double patenting over claims 1–8 of US 10,023,826 B2 (Application 14/819,466), issued July 17, 2018, in view of Menting. *Id.* at 10.

G. Claims 1, 11–14, 16, and 17 on the ground of nonstatutory double patenting over claims 1–15 of US 9,920,279 B2, issued Mar. 20, 2018, in view of Menting. *Id.* at 11.

H. Claims 1, 11–14, 16, and 17 on the ground of nonstatutory double patenting over claims 1–16 of US 9,657,255 B2, issued May 23, 2017, in view of Menting. *Id.* at 12.

I. Claims 7–10 on the ground of nonstatutory double patenting over claims 1–8 of US 10,023,826 B2 (Application 14/819,466), issued July 17, 2018, in view of Menting and Briggs. *Id* at 13.

J. Claims 7–10 on the ground of nonstatutory double patenting over claims 1–16 of US 9,657,255 B2, issued May 23, 2017, in view of Menting and Briggs. *Id.* at 14.

K. Claims 1, 7–14, 16, and 17 on the ground of nonstatutory double patenting over claims 1–14 of US 9,896,646 B2, issued Feb. 20, 2018, in view of Menting. *Id.*

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 in this Appeal and each of Appellant's arguments, 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.

Rejection A, written description. Appellant does not dispute this rejection. We, therefore, summarily sustain the rejection. *Ex parte Frye*, 94 USPQ2d at 1075.

Rejection B, obviousness over Labeque and Menting. The Examiner rejects claims 1 and 7–14 under 35 U.S.C. § 103 as obvious over Labeque in view of Menting. Ans. 4. Appellant argues all claims as a group. *See* Appeal Br. 3–7. 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 subject to this rejection stand or fall together with claim 1.

The Examiner finds, among other things, that Labeque teaches a quick dissolving unit dose fabric care article that may contain 1 to 70% by weight "anionic and/or nonionic surfactants." Ans. 4 (citing, for example, Labeque ¶¶ 38–41). The Examiner finds that Labeque does not teach certain other claim recitations. *Id.* at 5. The Examiner finds, however, that Menting teaches the remaining recitations of claim 1 and explains why a person of skill in the art would have combined the teachings of Labeque and Menting. *Id.* at 5–6 (citing Menting).

Appellant argues that neither Labeque nor Menting teaches that the ratio of anionic surfactant to non-ionic surfactant is a result effective variable. Appeal Br. 6. This argument is unpersuasive because the Examiner relies on overlapping ranges taught in Labeque to reach claim 1's recited ratio. Ans. 15–17. The Examiner finds that Labeque suggests, for example,

30% anionic surfactant and 5% non-ionic surfactant resulting in a 6:1 ratio within the scope of claim 1. *Id.* at 17. Appellant does not persuasively dispute this point.

Appellant also argues that Menting teaches away from claim 1's recited ratio because Menting prefers 80% non-ionic surfactant such that there would be four times as much non-ionic surfactant as other surfactants. Appeal Br. 6. Appellant's argument is unpersuasive. Menting states, "according to the process of the present invention, the non-ionic surfactant is present at a level of 5% of higher . . . preferably the level of non-ionic surfactant is up to 80% of the total surfactant present by weight." Menting ¶ 89. Menting thus prefers non-ionic surfactant as low as 5% by weight. Appellant does not establish that Menting discourages the ratios that Labeque suggests. *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994) ("A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant."); *In re Susi*, 440 F.2d 442, 446 n.3 (CCPA 1971) (holding that disclosed examples do not teach away from a broader disclosure).

Appellant also argues unexpected results. Appeal Br. 3–6. In particular, Appellant argues that the ratio of freshness actives, anionic surfactant, and non-ionic surfactant in the detergent composition surprisingly improves deposition of perfumes and freshness actives onto fabrics. *Id.* at 3. A party asserting unexpected results as evidence of nonobviousness has the burden of proving that the results are unexpected. *In re Geisler*, 116 F.3d 1465, 1469–70 (Fed. Cir. 1997). The evidence of unexpected results must

also be reasonably commensurate in scope with the claims. *In re Peterson*, 315 F.3d 1325, 1330–31 (Fed. Cir. 2003) (explaining that applicant may overcome a prima facie case of obviousness by showing unexpected results but the showing of unexpected results "must be commensurate in scope with the claims which the evidence is offered to support").

Here, Appellant presents a "headspace analysis" for four formulations. Appeal Br. 4–5. Appellant contends that this analysis demonstrates that an anionic to non-ionic weight ratio between 5:1 and 9:1 delivers 40% to greater than 200% better headspace analysis scores. *Id.* We agree with the Examiner that Appellant's data does not demonstrate unexpected results commensurate in scope with claim 1. Ans. 22. Claim 1 is open to, for example, many different surfactants and different perfumes in a wide variety of amounts. *Id.* Appellant has not established data or other evidence sufficient to support a conclusion that other embodiments within the scope of claim 1 will behave in the same manner as the examples Appellant tested. *In re Huai-Hung Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) ("If an applicant demonstrates that an embodiment has an unexpected result and provides an adequate basis to support the conclusion that other embodiments falling within the claim will behave in the same manner, this will generally establish that the evidence is commensurate with scope of the claims."). Because Appellant's evidence of unexpected results is not commensurate in scope with claim 1, this evidence does not outweigh the factors supporting obviousness that we address above and that the Examiner provides.

Because Appellant's arguments do not establish Examiner error, we sustain the Examiner's rejection.

Rejection C, obviousness over Boutoille and Labeque. The Examiner rejects claims 1, 11–14, 16, and 17 under 35 U.S.C. § 103 as obvious over Boutoille in view of Labeque. Ans. 6. Appellant argues that Boutoille does not cure the deficiencies of Labeque regarding weight ratio. Appeal Br. 7. As explained above, Labeque suggests Appellant's claimed ratio. We, thus, sustain this rejection.

Rejection D, obviousness over Labeque, Menting, and Boutoille. The Examiner rejects claims 16 and 17 as obvious over Labeque in view of Menting and further in view of Boutoille. Ans. 8. Appellant raises the same arguments we addressed above. Appeal Br. 7–8. We, thus, sustain this rejection.

Rejection E, obviousness over Boutoille, Labeque, and Briggs. The Examiner rejects claims 7–10 as obvious over Boutoille in view of Labeque and further in view of Briggs. Ans. 9. Appellant raises the same arguments we addressed above. Appeal Br. 8–9. We, thus, sustain this rejection.

Rejections F–K, nonstatutory double patenting. Appellant does not dispute the Examiner's nonstatutory double patenting rejections. We summarily sustain these rejections. *Ex parte Frye*, 94 USPQ2d at 1075.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 7–14, 16, 17	112	Written Description	1, 7–14, 16, 17	
1, 7–14	103	Labeque, Menting	1, 7–14	

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 11–14, 16, 17	103	Boutoille, Labeque	1, 11–14, 16, 17	
16, 17	103	Labeque, Menting, Boutoille	16, 17	
7–10	103	Boutoille, Labeque, Briggs	7–10	
1, 11–14, 16, 17		Nonstatutory Double Patenting, Application 14/819,466, Patent 10,023,826, Menting	1, 11–14, 16, 17	
1, 11–14, 16, 17		Nonstatutory Double Patenting, Patent 9,920,279, Menting	1, 11–14, 16, 17	
1, 11–14, 16, 17		Nonstatutory Double Patenting, Patent 9,657,255, Menting	1, 11–14, 16, 17	
7–10		Nonstatutory Double Patenting, Application 14/819,466, Patent 10,023,826, Menting, Briggs	7–10	
7–10		Nonstatutory Double Patenting, Patent 9,657,255, Menting, Briggs	7–10	
1, 7–14, 16, 17		Nonstatutory Double Patenting, Patent 9,896,646, Menting	1, 7–14, 16, 17	
Overall Outcome			1, 7–14, 16, 17	

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