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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* CHRISTINE MARIE CRANE,  
ANGELES CLARA FONOLLA-MORENO, OMOTAYO AWOFOSEBI,  
and ALICE MONIQUE ROSINE LEFEBVRE <sup>1</sup>

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Appeal 2019-006959  
Application 15/418,017  
Technology Center 1600

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Before DONALD E. ADAMS, ERIC B. GRIMES, and  
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) involving claims to a cosmetic composition, which have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> Appellant identifies the real party in interest as L’Oreal. Appeal Br. 1. We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a).

## STATEMENT OF THE CASE

The Specification states that “mascaras typically contain wax which is used to provide body and volume. However, the tackiness of the wax leads to mascara compositions that clump, apply unevenly, quickly dry the lashes, smudge, flake and are difficult to remove.” Spec. ¶2. The Specification discloses “compositions for keratinous material (for example, eyebrows and/or eyelashes” comprising water, a film-forming agent, a volumizing agent, and emulsifiers having low, intermediate, and high HLB values. *Id.* ¶7. “‘HLB’ refers to the ‘hydrophilic-lipophilic balance’ associated with emulsifiers.” *Id.* ¶78.

The volumizing agent can be an inert filler or a glyceryl ester of a fatty acid. *Id.* ¶63. “Particularly preferred as a source of glyceryl esters of fatty acid in accordance with the present invention is shea butter which contains, among other things, glyceryl esters of stearic acid (in an amount of 20%–50% by weight of shea butter) and oleic acid (in an amount of 40%–60% by weight [of] shea butter).” *Id.* ¶71.

Claims 1–6 and 8–20 are on appeal. Claims 1 and 2, reproduced below, are illustrative:

1. A composition comprising water, at least one dispersion of film forming particles in aqueous phase, at least one volumizing agent which is shea butter, and an emulsification system comprising about 2% to about 6% of low HLB emulsifier(s), about 2% to about 8% of intermediate HLB emulsifier(s), and about 1 % to about 8% of high HLB emulsifier(s) by weight with respect to the total weight of the composition.
2. The composition of claim 1, wherein the composition is a mascara.

## OPINION

Claims 1–6 and 8–20 stand rejected under 35 U.S.C. § 103 as obvious based on Bolognini<sup>2</sup> and Collin.<sup>3</sup> Final Action<sup>4</sup> 4. The Examiner finds that “Bolognini discloses a mascara composition comprising an emulsifying system including a gemini surfactant up to 5% by weight of the composition and a co-emulsifier from about 3% to about 15% by weight of the composition, a viscosity increasing agent, and a film forming agent.” *Id.* The Examiner finds that Bolognini discloses that “particularly preferred gemini surfactant-containing compositions comprise Ceralution H,” which is described as containing “behenyl alcohol, glyceryl stearate, glyceryl stearate citrate and sodium dicocoylethylenediamine PEG-15 sulfate.” *Id.*

The Examiner finds that Appellant’s Specification describes glyceryl stearate as a low HLB emulsifier; behenyl alcohol and glyceryl stearate citrate as intermediate HLB emulsifiers; and sodium dicocoylethylenediamine PEG-15 sulfate as a high HLB emulsifier. *Id.* at 5. The Examiner calculates that using 20% Ceralution H in Bolognini’s composition, as suggested by Bolognini, would result in amounts of low, intermediate, and high HLB emulsifiers within the ranges recited in claim 1. *Id.* at 5–6.

The Examiner notes that Bolognini does not disclose shea butter as a volumizing agent, but finds that Collin discloses a mascara composition “wherein the composition comprises Shea butter oil.” *Id.* at 5. The Examiner

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<sup>2</sup> US 2015/0079015 A1, published March 19, 2015.

<sup>3</sup> US 2004/0009201 A1, published January 15, 2004.

<sup>4</sup> Office Action mailed November 20, 2018.

concludes that it would have been obvious “to combine the teachings of Bolognini et al. and Collin et al. to include a the [sic] shea butter oil in a mascara composition” because “shea butter is a non-volatile oil that makes it possible to obtain a very good curling of the eyelashes [0055] as evidenced by the disclosure of Collin.” *Id.* at 10.

Appellant argues that “Collin does not teach or suggest shea butter. Shea butter and shea butter oil are not the same thing. On a fundamental level, shea butter is solid, shea butter oil is not.” Appeal Br. 3. Appellant cites “[t]he website page which is exhibit A,” included in the Evidence Appendix of the Appeal Brief, as “describ[ing] the difference between shea butter and shea butter oil as follows:

What is the difference between Shea butter and Shea oil?

Shea oil is the liquid version of Shea butter. It is fractionated from Shea butter by removing some of the stearin. As a result you get higher levels of fatty acids like oleic and linoleic acid, and lower levels of stearic acid. Shea oil remains liquid at 20 C.

Appeal Br. 3. Appellant thus argues that “shea butter oil may originally be associated with shea butter (pre-fractionation), but it is different from shea butter, and has different properties from shea butter.” *Id.*

We agree with Appellant that the rejection on appeal is not supported by a preponderance of the evidence. The Examiner cites Collin as providing a reason to include shea butter in Bolognini’s composition. Collin discloses “a composition for coating keratinous fibres comprising a wax and a liquid fatty phase.” Collin ¶ 1. The composition can be a mascara. *Id.*

Collin states that the liquid fatty phase comprises a volatile organic solvent, *id.* ¶ 37, and “may also contain nonvolatile oils, and in particular nonvolatile hydrocarbon and/or silicone and/or fluorinated oils.” *Id.* ¶ 45.

One nonvolatile hydrocarbon oil that can be included is shea butter oil. *Id.*  
¶ 48.

Collin states that “[t]he nonvolatile oils may be present in the composition according to the invention in an amount ranging from 0% to 5% by weight.” *Id.* ¶ 55. “Advantageously, the composition according to the invention contains no nonvolatile oil, the composition thus making it possible to obtain a very good curling of the eyelashes.” *Id.*

The disclosure pointed to by the Examiner therefore states that omitting, not including, a nonvolatile oil like shea oil in Collin’s composition makes it possible to obtain good curling of the eyelashes. Collin thus does not support the Examiner’s conclusion that it would have been obvious to include shea butter oil in Bolognini’s composition in order to obtain good curling of the eyelashes.

In addition, the evidence of record supports Appellant’s position that shea butter oil is different from shea butter. Appellant’s Exhibit A states that unrefined shea butter contains approximately 43% stearic acid, 46% oleic acid, 7% linoleic acid, and 4% palmitic acid, while shea oil<sup>5</sup> contains approximately 27% stearic acid, 59% oleic acid, 9% linoleic acid, and 5% palmitic acid. Exhibit A, pp. 3–4. Exhibit A also states, as quoted in the Appeal Brief, that “Shea oil . . . is fractionated from Shea butter by removing some of the stearin. As a result you get higher levels of fatty acids like oleic and linoleic acid, and lower levels of stearic acid. Shea oil remains liquid at 20°C.” *Id.* at 4.

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<sup>5</sup> The Examiner does not dispute that Collin’s “shea butter oil” is the same as Exhibit A’s “shea oil.” *See Ans.* 5–7.

Thus, the evidence of record shows that shea oil (or shea butter oil) is a different product from shea butter. The Examiner points to Appellant's Specification, which states that "shea butter . . . contains, among other things, glyceryl esters of stearic acid (in an amount of 20%–50% by weight of shea butter) and oleic acid (in an amount of 40%–60% by weight [of] shea butter)." Ans. 5–6, quoting Spec. ¶ 71. The Examiner reasons that the "specification discloses shea butter contains glyceryl esters of stearic acid in an amount from [sic] 20–50% by weight and oleic acid from 40–60% by weight [0071]. The stearic acid range reads on both the unrefined shea butter and the shea oil of" Exhibit A. *Id.* at 6.

However, regardless of what the Specification says about the potential amounts of stearic acid and oleic acid in shea butter, Exhibit A states that shea oil is "fractionated from Shea butter by removing some of the stearin." Exhibit A, p. 4. Thus, the shea butter oil disclosed by Collin is not unfractionated shea butter but the product resulting from fractionation of shea butter.

The Examiner also points to Masters<sup>6</sup> as "disclos[ing] that the shea tree comprises a mixture of edible oils and fats known as shea butter." Ans. 6. This disclosure, however, does not support a conclusion that Collin's shea butter oil meets the claim limitation requiring shea butter.

We conclude that the rejection of claims 1–6 and 8–20 under 35 U.S.C. § 103 based on Bolognini and Collin is not supported by a preponderance of the evidence, and we therefore reverse it.

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<sup>6</sup> Masters et al., "Reinforcing sound management through trade: shea tree products in Africa," *Unasylva* 219, Vol. 55, pp. 46–52 (2004)

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-6, 8-20	103	Bognini, Collin		1-6, 8-20

REVERSED