

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte LORI H. SZELES, XIAOYAN LIU,
MALCOLM WILLIAMS, and JAMES G. MASTERS

Appeal 2007-4451
Application 10/143,395
Technology Center 1600

Decided: December 6, 2007

Before DONALD E. ADAMS, LORA M. GREEN, and
RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1-8. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

Claims 1-15 are pending (Appeal Br. 2). Claims 9-15 are withdrawn from consideration; Claims 1-8 are appealed (*id.*). We select claim 1, the only independent claim on appeal, as representative of the claims. Claim 1 reads as follows:

A dual component antiplaque dentifrice composition effective to reduce plaque and oral malodor comprising a first dentifrice component comprised of an orally acceptable aqueous vehicle containing a humectant, an abrasive and a nonionic antibacterial agent and a second component comprised of an orally acceptable aqueous vehicle containing a humectant, an abrasive and a proteolytic enzyme, the first and second components being simultaneously combined for application to the teeth, the first and second components being physically segregated prior to use, the components when combined and mixed upon application to teeth providing an antiplaque effect with a superior antimalodor benefit.

Appellants request review of the following rejections:

1. Claims 1-8 under 35 U.S.C. § 112, second paragraph, as indefinite in failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention (Answer 5).
2. Claims 1, 4, and 8 under 35 U.S.C. § 102(a) as anticipated by ES ‘773 (Spanish Patent (“ES”) No. 2158773, Sept. 1, 2001) (Answer 6).
3. Claims 1-8 under 35 U.S.C. § 103(a) as obvious over ES ‘773 in view of Pan (U.S. Pat. No. 5,891,422, Apr. 6, 1999) or BE ‘463 (Belgium Patent (“BE”) No. 739463¹), BE ‘331 (BE No. 755331²), and

¹ We could not find a copy of the Belgium patent in the record before us. Apparently, the Belgium patent was replaced by U.S. Patent No. 3,751,561 (Aug. 7, 1973), pursuant to the Board’s request to the Examiner that a complete copy and translation of the Belgium patent be provided (Order Returning Undocketed Appeal to Examiner, dated Aug. 16, 2005). However, we find no statement in the Answer that the U.S. patent corresponds to BE ‘463. Based on a patent family search in a file paper dated March 14, 2006, we infer that the U.S. Patent corresponds to BE ‘463. However, because the Examiner has not explicitly stated what reference is

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Ebine (U.S. Pat. No. 5,178,869, Jan. 12, 1993), Glandorf (U.S. Pat. No. 5,820,852, Oct. 13, 1998), or Pellico (U.S. Pat. No. 4,537,764, Aug. 27, 1985) (Answer 6).

4. Claims 1-8 under 35 U.S.C. § 103(a) as obvious over Glandorf in view of Pan or BE ‘463, BE ‘331, and Ebine or Pellico (Answer 7).
5. Claims 1-8 under 35 U.S.C. § 103(a) as obvious over Gebreselassie (U.S. Pat. No. 6,379,654 B1, Apr. 30, 2002) (Answer 8).

ISSUES ON APPEAL

Claim 1 is directed to a “dual antiplaque dentifrice composition” comprising a “first dentrifrice component” and a “second component.” The first component comprises “a humectant, an abrasive and a nonionic antibacterial agent.” The second component comprises “a humectant, an abrasive and a proteolytic enzyme.”

According to the Examiner, the claim is indefinite under 35 U.S.C. § 112, second paragraph, because it is “confusing” whether the components are separated from each other or not (Answer 9-10). While the claim recites that the composition comprises first and second components “being physically segregated prior to use,” the Examiner states that the claim does not “put the two components into a tube or container which would be characteristic of a

relied upon in the ground of rejection, we find that the rejection was not properly stated.

² We also could not find a copy of this Belgium patent in the record before us. Apparently, for the reasons discussed in fn. 1, the Examiner replaced the Belgium patent with GB 1 265 468, Mar. 1, 1972 (file paper dated Mar. 14, 2006), but the Examiner makes no reference to this substitution in the Answer.

[dual component] kit” (Answer 10). Furthermore, the claim recites that the “the first and second components being simultaneously combined for application to the teeth,” which the Examiner contends indicates that the components are combined together and not separated from each other (Answer 10). In rejecting the claims under 35 U.S.C. § 102 and § 103, the Examiner interprets claim 1 to “read on” all ingredients of the two components as being combined together in the same composition (Answer 10).

Appellants contend that the “claims on appeal clearly indicate that the claimed oral composition is a dual component composition which prior to use of the components, the components are stored separately but when used, are combined and mixed together during application to the teeth” (Appeal Br. 4).

Thus, the rejections in this appeal turn on whether claim 1 is properly interpreted to cover two separated components, where the ingredients of each component are physically segregated from each other, or to cover a composition in which all ingredients recited in the claim are combined together in a single composition.

CLAIM INTERPRETATION

Claim 1 is a “dual component antiplaque dentifrice composition” comprising first and second components. The claim recites that the “first and second components being physically separated prior to use,” indicating – as Appellants’ contend – that the components are separate, and not “together” as found by the Examiner. The source of the Examiner’s confusion is that the claim also recites that “the first and second components

being simultaneously combined for application to the teeth” – which the Examiner’s contends opens the claims to the interpretation that all the ingredients are in one single composition. As explained in more detail below, we find that Examiner erred in interpreting claim 1.

During patent examination, the PTO gives the words in a claim their “broadest reasonable meaning . . . in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997); *In re Crish*, 393 F.3d 1253, 1256 (Fed. Cir. 2004). With this as a guiding principle, we first turn to the Specification.

According to the “Summary of the Invention,” the invention is based upon the discovery that when a separately maintained first nonionic antibacterial compound containing dental component and a second enzyme containing dentifrice component are simultaneously combined and thereafter applied to the surface of the teeth, undiminished antiplaque efficacy is unexpectedly obtained with a superior retardation of oral cavity malodor when the teeth are brushed with the combined components

(Specification 2: 29-33).

An embodiment of the invention is described as a “dual component dentifrice composition” – the same words used in the preamble of claim 1 – “comprised of separate nonionic antibacterial compound and enzyme containing dentifrice components” where “the components are maintained separate from each other and are not combined” until applied to the teeth (Specification 3: 1-5). In claim 1, the first component comprises a “nonionic

antibacterial agent” and the second component comprises a “proteolytic enzyme,” consistent with this description in the Specification.

The packaging of the dual component dentifrice is described in the Specification as “a tube or pump in which the components are maintained physically separated and from which the separated components may be dispensed synchronously” (Specification 10: 28-32). Example I describes the two separate compositions (“Components A and B”) and states that they “are combined, for example on the toothbrush” (Specification 12).

Thus, the entire written description of the Specification is focused on a dentifrice that contains two separate components that are combined just prior to use. In this light, we find that the proper interpretation of claim 1 – which explicitly is directed to a “dual component” composition comprising two components “physically segregated prior to use” – is that the first and second components are physically separated from each other. The claim limitation that the components are “simultaneously combined for application to the teeth” is an intended use of the claimed invention, consistent with the subsequent claim limitation that “the components when combined and mixed upon application to teeth providing an antiplaque effect with a superior antimalodor benefit.”

ANALYSIS

Rejection under § 112, second paragraph

The Examiner rejected claims 1-8 under 35 U.S.C. § 112, second paragraph, as indefinite in failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

For the reasons discussed above, we find that claim 1, when read in the context of the Specification, is not indefinite but would be clearly understood by persons of ordinary skill in the art to be directed to a dual component dentifrice with two “physically segregated” components. Thus, we reverse the rejections of claims 1-8.

Rejection under § 102

The Examiner rejects claims 1, 4, and 8 under 35 U.S.C. § 102(a) as anticipated by ES ‘773.

The Examiner finds that ES ‘773 describes a composition which comprises all ingredients recited in claim 1³ and thus, anticipates it (Answer 6).

Claim 1, as we have properly interpreted it, is directed to a two-component dentifrice comprising two physically segregated components. The Examiner has not provided any evidence that the dentifrice ingredients described in ES ‘773 are physically separated into two components. Accordingly, we reverse the rejection of claims 1, 4, and 8.

Rejections under § 103

The Examiner rejects:

claims 1-8 based on ES ‘773 in view of Pan or BE ‘463, BE ‘331, and Ebine, Glandorf, or Pellico;

³ The Examiner states that the “reference teaches a composition having both papain and triclosan and the other claimed ingredients” (Answer 6). This is not an adequate statement of the ground of rejection. The Examiner has not identified where each of the “other claimed ingredients” are described in ES ‘773 nor which ingredients in claim 1 correspond to “the other claimed ingredients.”

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claims 1-8 based on Glandorf in view of Pan or BE ‘463, BE ‘331, and Ebine or Pellico; and

claims 1-8 based on Gebreselassie.

In each of these rejections under 35 U.S.C. § 103, the Examiner concludes that it would have been obvious to have combined the dentifrice ingredients described in the prior art references “in order to form a third composition which is useful for the same purpose” (Answer 7, 8, and 9). Claim 1, as we have properly interpreted it, is directed to a two-component dentifrice comprising two physically segregated components. The Examiner has not provided any evidence that the dentifrice ingredients described in the cited prior art references are physically separated into two components as required by claim 1. Therefore, we reverse all the rejections of claims 1-8 under § 103.

OTHER ISSUES

Upon return of the application to the Technology Center, the Examiner should reconsider the prior art in view of the above interpretation of claim 1.

REVERSED

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