

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TIMOTHY ALAN SCAVONE, BENJAMIN SCOTT
SCHLAGHECK, LISA ANN RUNTZ, and KELLY LYNN CASSIERE

Appeal 2008-0581
Application 10/317,339
Technology Center 1600

Decided: 29 January 2008

Before SALLY G. LANE, MICHAEL P. TIERNEY, and
JAMES T. MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

DECISION ON APPEAL

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STATEMENT OF CASE

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The Appellants appeal under 35 U.S.C. § 134 (2002) from a final
rejection of claims 2, 4, 11, 13, 14, 16, and 18.¹ We have jurisdiction under
35 U.S.C. § 6(b) (2002).

¹ Claims 1, 3, 5-10, 12, 15, 17, and 19-25 have been canceled.

1 THE REJECTIONS

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3 The following rejections are before us for review:

4 1. Claims 2, 4, 11, 13, 14, 16, and 18 stand rejected under 35 U.S.C.

5 § 103(a) (2004) over the combination of Brenner, Beck, and Guskey.

6 2. Claims 2, 4, 11, 13, 14, 16, and 18 stand rejected under 35 U.S.C.

7 § 103(a) (2004) over the combination of Trinh and Beck.

8 We AFFIRM.

9

ISSUES

10 Have the Appellants established that the Examiner erred in
11 determining that it would have been obvious to one of ordinary skill in the
12 art at the time the invention was made to combine the known elements of the
13 prior art for their known functions to arrive at the claimed subject matter?

14

FINDINGS OF FACT

15 The record supports the following findings of fact by a preponderance
16 of the evidence:

17 1. Brenner describes compounds having activity as antiperspirants.
18 (Brenner 1:6-7).

19 2. Brenner's active antiperspirant compounds contain aluminum.
20 (1:5-10).

21 3. Brenner describes that the compounds provided by the invention
22 have good perspiration absorbing capability and do not irritate the skin.
23 (4:65-5:2).

24 4. Brenner describes that when the active compounds are

1 incorporated into conventional cosmetically acceptable carriers, vehicles or
2 formulations, then a composition with antiperspirant, deodorant or a
3 combination of these properties is formed. (6:47-51).

4 5. Brenner's carriers include the generally acceptable nonirritating
5 carriers used for antiperspirants in cosmetics, e.g., in the form of powders,
6 sticks, creams solutions, aerosols and the like. (6:51-56).

7 6. Brenner describes that additives used in the invention, such as
8 panthenol or one of its lower alkyl ethers, increase the skin metabolism
9 and/or the skin elasticity. (6:59-61).

10 7. Brenner describes that the antiperspirant/deodorant composition
11 preferably contains between about 1 and 30% by weight of the active
12 compound or mixtures of active compounds. (7:4-8).

13 8. Brenner describes that the compositions can also contain other
14 cosmetically valuable substances, such as other perspiration-inhibiting or
15 deodorizing compounds. (7:9-12).

16 9. Brenner describes an example of a typical composition
17 comprising 3.0 gm Isobutyl-aluminum-diethylate, 7.0 gm n-hexane, 0.2 gm
18 panthenol ethyl ether, and propellant gas mixture sufficient to total a 100 gm
19 preparation. (Example 1(b), 10:40-43).

20 10. Brenner describes methods of controlling perspiration and
21 perspiration odor comprising applying the antiperspirant/deodorant
22 composition to the skin area to be affected. (20:25-30).

23 11. One difference between Brenner and the claimed invention is that
24 Brenner does not expressly describe using panthenyl triacetate.

1 12. Another difference between Brenner and the claimed invention is
2 that Brenner does not expressly describe using petrolatum.

3 13. Beck describes topical compositions for improving the
4 appearance or other conditions of skin. (Beck 1:7-9).

5 14. Beck describes that the compositions provide good coverage of
6 skin imperfections, such as pores and uneven skin tone, while retaining a
7 natural skin appearance. (1:10-12).

8 15. Beck describes that the compositions are useful to treat hands and
9 other non-facial parts of the body. (1:12-14).

10 16. Beck describes that a composition comprising an active for
11 chronically regulating skin condition and one or more particulate actives of
12 defined refractive index and particle size can enhance improvements in short
13 and long-term appearance and feel of skin. (1:61-67).

14 17. Beck describes that the topical compositions claimed are suitable
15 for imparting an essentially immediate improvement in skin feel and
16 appearance. (2:1-3).

17 18. Beck describes that the topical compositions contain a particulate
18 material, such as polymethylsilsesquioxane, which provides desirable
19 coverage of skin imperfections such as pores and uneven skin tone while
20 maintaining a natural skin appearance. (2:3-8).

21 19. Beck describes that the invention also relates to cosmetic methods
22 of improving skin appearance and/or condition by topical application of the
23 subject compositions. (2:18-20).

24 20. Beck describes that the topical compositions may comprise a

1 variety of optional components, that may be dispersed, dissolved or the like
2 in the carrier of the compositions. (8:58-65).

3 21. Beck describes optional components include anti-inflammatory
4 agents. (8:66-9:8).

5 22. Beck describes that a safe and effective amount of an anti-
6 inflammatory agent may be added to the composition preferably from about
7 0.1% to about 5%, and more preferably from about 0.1% to about 2% of the
8 composition. (14:17-21).

9 23. Beck describes that the exact amount of anti-inflammatory agent
10 used will depend upon the potency of the anti-inflammatory agent selected.
11 (14:24-27).

12 24. Beck describes that the anti-inflammatory agent enhances the
13 skin appearance benefits of the composition, e.g., the agents contribute to a
14 more uniform and acceptable skin tone or color. (14:21-24).

15 25. Beck describes that useful anti-inflammatory agents include:
16 Steroids; non-steroidal anti-inflammatory drugs (NSAIDS); panthenol and
17 its ether and ester derivatives, e.g., panthenol ethyl ether and panthenyl
18 triacetate; and, pantothenic acid and its salt and ester derivatives. (14:28-
19 33).

20 26. Beck describes that particularly preferred anti-inflammatory
21 agents are panthenol, pantothenic acid and their ether, ester or salt derivative
22 and mixtures thereof, having suitable levels from about 0.1 to about 5% and
23 preferably from about 0.5 to about 3%. (14:38-42).

24 27. Guskey describes low-irritation antiperspirant and deodorant

1 compositions comprising a volatile, nonpolar hydrocarbon liquid and a skin
2 irritation-mitigating material. (1:6-9).

3 28. Guskey describes the mitigating material in the compositions
4 reduces or eliminates skin irritation associated with the topical application of
5 the volatile, nonpolar hydrocarbon liquid from an antiperspirant or
6 deodorant composition. (1:9-12).

7 29. Guskey describes antiperspirant compositions which comprise an
8 antiperspirant active at a concentration of from about 0.01% to about 60%,
9 more preferably from about 5 to about 35%, and even more preferably from
10 about 7 to about 26%.

11 30. Guskey describes that particularly preferred antiperspirant
12 actives are aluminum and zirconium salts. (4:22-29).

13 31. Guskey describes that the antiperspirant embodiments can also be
14 formulated to comprise other materials, either in addition to, or in place of
15 the antiperspirant active, including deodorant actives and/or perfumes. (5:4-
16 10).

17 32. Guskey describes that the compositions may be in the form of
18 soft solids/semisolids/creams, solid sticks, aerosols, roll-on liquids, gel solid
19 sticks, and suspension/emulsions. (16:35,65; 17:27; 18:3; 19:20,47).

20 33. Guskey describes that the preferred mitigating materials are
21 nonvolatile-silicone containing materials. (9:3-4).

22 34. Guskey describes that the mitigating materials, individually or
23 collectively, are at a concentration of from about 1% to about 60%,
24 preferably from about 5% to about 30%, and more preferably from about 5%
25 to about 10% by weight of the composition. (8:45-51).

1 35. Guskey describes that non-silicone containing organic emollients,
2 although less preferred, may also be used as mitigating materials.
3 (11:32-34).

4 36. Guskey describes that among the non-silicone containing
5 emollients, highly occlusive materials such as petrolatum are most preferred.
6 (11:37-38).

7 37. Trinh describes personal treatment compositions comprising
8 perfumes that provide a long lasting perfume benefit with a minimum
9 amount of material and are relatively non-irritating. (Trinh 1:57-61).

10 38. Trinh describes that the personal treatment compositions include
11 deodorants and antiperspirants that are normally applied to one or more parts
12 of the body and are incompletely removed. (2:60-65).

13 39. Trinh describes that the compositions can contain an astringent
14 antiperspirant active, typically used at levels from about 0.5 to about 60%,
15 and preferably from about 5% to about 35%. (38:21-25).

16 40. Trinh describes that any aluminum astringent antiperspirant salt
17 or aluminum and/or zirconium astringent complex can be employed in the
18 antiperspirant active. (38:48-49).

19 41. Trinh describes optionally adding to non-rinsed compositions
20 aesthetic components such as fragrances, colorings, essential oils, skin
21 sensates, astringents, skin soothing agents, skin healing agents and the like.
22 (44:43-45; 45:6-9).

23 42. Trinh describes that non-limiting examples of the aesthetic
24 components include panthenol and derivatives, (e.g. ethyl panthenol), and
25 pantothenic acid and its derivatives. (45:9-11).

1 “substantially” from the claims. Specifically, the clause stated that the
2 claimed composition is “stable after 24 hours at 85C, wherein stable means
3 that said composition is ~~substantially~~ free of off-odor and free of undesirable
4 visible crystals.” (Amendment after 2nd Office Action, Nov. 2, 2006, pp. 2,
5 4).

6 In the ensuing Final Rejection, the Examiner found the resulting
7 limitation that the “composition is free of odors after 24 hours is considered
8 new matter.” (Final Rejection, Jan. 29, 2007, p. 2)(emphasis in original).
9 The Examiner found that the Applicants provided data for panthenyl
10 triacetate and support for no visible crystal formation or “off-odor
11 formation” at 24 hours, but did not provide support for a composition free of
12 visible crystal formation and “off-odor formation” after 24 hours. (Id.)

13 Subsequently, the Applicants filed a proposed amendment seeking to
14 change the term “after” to “at” in the independent claims. (Amendment after
15 Final Office Action, Mar. 7, 2007, pp. 2-5). The Examiner declined to enter
16 the amendment in an Advisory Action, stating that “the amendment after-
17 final requires further consideration since the limitation was not present for
18 the examiner to consider prior to the Final Office Action of 1/29/07.”
19 (Advisory Action, Mar. 23, 2007, p. 2).

20 On appeal, the Appellants do not assert that the claims are supported
21 by the specification or otherwise make persuasive arguments refuting the
22 Examiner’s position on the pending rejection. Rather, the Appellants urge
23 that “the proposed amendment should have been entered, at least for
24 purposes of appeal....” (Br. pp. 2, 7). The proper route to obtain review of

1 an Examiner's decision to refuse to enter an amendment after final rejection
2 is by way of a petition to the Director. 37 C.F.R. § 1.181.

3 II. The 35 U.S.C § 103(a) Rejections

4 A. The Rejection of Claims 2, 4, 11, 13-14, 16, and 18 under 35
5 U.S.C. § 103(a) as being unpatentable over the combination of Brenner,
6 Beck, and Guskey.

7 Claims 2, 4, 11, 13-14, 16, and 18 stand rejected under 35 U.S.C.
8 § 103(a) as being unpatentable over the combination of Brenner, Beck, and
9 Guskey.

10 *Brenner- Antiperspirant Compositions with Additives*

11 The Examiner found that Brenner teaches antiperspirant compositions
12 having generally acceptable non-irritating carriers used for antiperspirants in
13 cosmetics. (Final Rejection, Jan. 29, 2007, p. 3). The Examiner also found
14 that Brenner teaches additives used to increase skin metabolism and/or skin
15 elasticity, including panthenol or one of its lower alkyl ethers. (Id.).
16 Brenner teaches the percent by weight of the active compounds or mixtures
17 of active compounds contained in the antiperspirant and/or deodorant
18 mixtures. (Id. p. 4).

19 The Examiner determined that Brenner specifically teaches an
20 example composition that contains 0.2 grams panthenol ethyl ether (ethyl
21 panthenol). (Final Rejection, Jan. 29, 2007, p. 4). Brenner teaches a method
22 of controlling perspiration and perspiration odor comprising applying the
23 composition to the skin area needing perspiration control. (Id.) The
24 Examiner also determined, however, that Brenner does not teach using
25 panthenyl triacetate or using petrolatum in the instant amount. (Id.)

1 The presently argued difference between Brenner and the claimed
2 invention principally resides in the use of panthenyl triacetate in the
3 antiperspirant composition.

4 *Beck- Enhancing Skin with Panthenyl Triacetate*

5 The Examiner found that Beck teaches a skin care composition to
6 improve the appearance of skin, especially useful for areas other than facial
7 skin. (Final Rejection, Jan. 29, 2007, p. 4). Beck teaches that anti-
8 inflammatory agents in the amount of 0.1% to about 5% enhance the skin
9 appearance and contribute to a more uniform and acceptable skin tone or
10 color. (Id. p. 5).

11 According to the Examiner, Beck teaches that useful anti-
12 inflammatory agents include panthenol and its ether and ester derivatives,
13 including panthenol ethyl ether (ethyl panthenol), panthenyl triacetate;
14 pantothenic acid and salt and its ester derivatives, especially calcium
15 pantothenate. (Id.). The Examiner additionally found that Beck teaches that
16 panthenol, pantothenic acid and their ether, ester or salt derivatives and
17 mixtures thereof are particularly preferred, in an amount of about 0.1 to
18 about 5%, preferably from about 0.5 to about 3%. (Id.).

19 *Guskey- Petrolatum as a Skin Irritation-Mitigating Material*

20 The Examiner found that Guskey teaches low-irritation antiperspirant
21 and deodorant compositions comprising a volatile, nonpolar hydrocarbon
22 liquid and a skin irritation-mitigating material. (Final Rejection, Jan. 29,
23 2007, p. 5). The Examiner also determined that Guskey teaches that the
24 mitigating material reduces or eliminates skin irritation associated with the

1 topical application the volatile, nonpolar hydrocarbon liquid from an
2 antiperspirant or deodorant composition. (Id.)

3 The Examiner found that Guskey teaches a mitigating material in the
4 amount of 1% to about 60%, preferably from about 5% to about 30%, more
5 preferably from about 5% to about 10%. (Final Rejection, Jan. 29, 2007, p.
6 5). According to the Examiner, Guskey describes that the skin mitigating
7 material includes any material effective in reducing skin irritation due to the
8 hydrocarbon and providing emolliency such as petrolatum. The Examiner
9 also found that Guskey teaches that petrolatum is the most preferred non-
10 silicone occlusive material. (Id. pp. 5-6).

11 *The Combination of Brenner, Beck and Guskey*

12 The Examiner concluded that it would have been obvious to one of
13 ordinary skill in the art at the time of invention to combine the teachings of
14 Brenner and Beck, substituting Brenner's pantothenic acid derivative with
15 the claimed panthenyl triacetate. The Examiner determined that motivation
16 for combining these teachings is provided by Beck's teaching a skin care
17 composition for improving the appearance of skin and using ethyl panthenol
18 and panthenyl triacetate to enhance skin appearance by improving skin color
19 and tone. (Final Rejection, Jan. 29, 2007, p. 5).

20 The Examiner also determined that the prior art teaches that both
21 panthenol ethyl ether and panthenyl triacetate are functional equivalents in
22 improving skin tone and color so that a skilled artisan would have
23 reasonably expected similar results in substituting one for the other. (Final
24 Rejection, Jan. 29, 2007, pp. 5-6). The Examiner additionally found that a
25 skilled artisan would expect similar results from such substitution because

1 Brenner teaches the use of pantothenic acid derivatives for their skin
2 enhancing effects of improving skin elasticity and metabolism. (Id.)

3 The Examiner stated that because Beck teaches using 0.5-3%
4 pantothenic acid derivatives in skin care compositions and Brenner teaches
5 using 2% panthenol ethyl ether in a composition applied to the skin, the
6 pantothenic acid derivatives would have the same effect. (Id. p. 6).

7 The Examiner also concluded that it would have been obvious to one
8 of ordinary skill in the art at the time the invention was made to combine the
9 volatile hydrocarbon-containing composition in Brenner with the petrolatum
10 described in Guskey and to use petrolatum in the amount claimed. (Final
11 Rejection, Jan. 29, 2007, p. 6). According to the Examiner, the motivation
12 for this combination is provided by Guskey's teaching that petrolatum acts
13 as a skin mitigating material to reduce irritation cause by volatile
14 hydrocarbon. (Id.)

15 The Examiner further concluded that application of the
16 antiperspirant/deodorant composition under the arm would have been
17 obvious to one of ordinary skill in the art at the time the invention was made
18 obvious based upon Brenner's teaching to apply the composition to the area
19 requiring perspiration control. (Final Rejection, Jan. 29, 2007, p. 6).

20 Similarly, the Examiner determined that Brenner inherently describes the
21 preamble "softening the hair and reducing the need for shaving" because
22 Brenner teaches a similar antiperspirant composition comprising the same
23 ingredients in the same proportion for the same underarm method of use.
24 (Id.).

1 Finally, the Examiner found that one of ordinary skill in the art would
2 have combined the known ingredients for their known purpose, formation of
3 an antiperspirant with skin-care properties. Further, the Examiner found that
4 the prior art composition will have the claimed stability, as the suggested
5 prior art composition contains the same components in the same proportions
6 as that claimed by Appellants. (See Final Rejection, Jan. 29, 2007, p. 7).
7 The Examiner then concluded that the combined teachings of the prior art
8 provide a composition comprising all of the claimed components in the
9 claimed weight percents. (Id.).

10 The Appellants initially assert that the Examiner failed to establish a
11 prima facie case of obviousness in rejecting the claims as being unpatentable
12 over the combination of Brenner, Beck and Guskey because there is no
13 motivation or suggestion to combine the references. (Br. pp. 5-7).

14 Specifically, the Appellants argue that there is no motivation to
15 combine Beck's teaching that panthenyl triacetate improves skin color and
16 tone with Brenner because "neither Brenner nor the rejected claims relate in
17 any way to improving skin color and tone," as taught by Beck. (Id. p. 5).
18 Accordingly, the Appellants "disagree with the asserted motivation to
19 modify Brenner with the disclosure of Beck to arrive at the rejected claims."

20 This argument is not persuasive.

21 First, we observe that the motivation to combine references need not
22 be identical to that of the applicants to establish obviousness. See *In re*
23 *Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996). Because Beck suggests an
24 advantage to be attained by the addition of anti-inflammatory agents, it is
25 valid to make the combination advanced by the Examiner, even if for a

1 different purpose than that of the Appellants. Beck describes that an anti-
2 inflammatory agent, such as panthenyl triacetate, “enhances the skin
3 appearance benefits” of the patented composition. Beck then describes that
4 an example of this enhancement is improved skin tone or color. By
5 describing this example, Beck does not limit its teachings of the benefits of
6 panthenyl triacetate to improved skin appearance.

7 Similarly, Brenner provides an additive to improve skin appearance.
8 Brenner describes an antiperspirant composition containing panthenol, or
9 one of its lower alkyl ethers, such as panthenol ethyl ether, as the additive.
10 Brenner describes that this panthenol additive increases skin metabolism
11 and/or skin elasticity. The fact that the additive in Brenner is described in a
12 different manner than the additive in Beck, does not negate the fact that both
13 additives were known in the art to improve the appearance of skin. As stated
14 in *In re Fout*, 675 F.2d 297, 301 (CCPA 1982), “Express suggestion to
15 substitute one equivalent for another need not be present to render such
16 substitution obvious.” The known properties of these additive taught by the
17 references would make it obvious to a person of ordinary skill in the art at
18 the time of the invention to select the panthenyl triacetate described by Beck,
19 as the additive to improve skin condition described by Brenner.

20 Moreover, it is evident from the references that these components are
21 well known skin treatment agents. The simple combination of these known
22 elements in a known manner and used in a known manner to provide the
23 claimed invention amounts to a predictable variation that can be
24 implemented by a person of ordinary skill. *See KSR International Co. v.*
25 *Teleflex Inc.*, 127 S. Ct. 1727, 1740, (2007). Thus we do not find error with

1 the Examiner's conclusion that the prior art provides motivation to combine
2 these elements so as to establish a prima facie evidence of obviousness.

3 The Appellants additionally argue that the Examiner is incorrect in
4 finding that panthenol ethyl ether described by Brenner is functionally
5 equivalent to the panthenyl triacetate disclosed in Beck. The Appellants
6 urge that their specification established that these pantothenic acid
7 derivatives are not functionally equivalent with regard to "crystal formation
8 and off-odor formation in a composition comprising an antiperspirant
9 active." (Br. p. 5).

10 Appellants' contend that the data in its specification demonstrates that
11 panthenol ethyl ether and panthenyl triacetate are not functional equivalents.
12 (Br. p. 5, citing Specification, Comparative Data table, p. 17). We have
13 reviewed the data cited by Appellants, but do not find it persuasive for at
14 least the following reasons.

15 An appellant rebutting a prima facie case of obviousness may present
16 comparative test data showing that the claimed invention possesses
17 unexpectedly improved properties or properties that the prior art does not
18 have. *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995). Appellants' however,
19 have failed to explain how the comparative data presented in its specification
20 compares with the closest prior art. For example, the comparative data
21 states that both ethyl panthenol (aka, panthenol ethyl ether) and panthenyl
22 triacetate showed no visible crystal formation but ethyl panthenol showed
23 slight "off-odor" at 24 hours, whereas panthenyl triacetate did not.
24 (Specification 17:15-18). This showing represents a single data point
25 without any useful background information pertaining to that data point,

1 e.g., how the data point compares with the closest prior art compositions
2 cited by the Examiner. Furthermore, no methodology for determining the
3 presence of “off odor” is presented. We are not informed what constitutes
4 an “off odor” and how it is determined. Given Appellants’ lack of guidance
5 as to the data in the specification, we are unable to state that the data point
6 represents a valid comparison with the closest prior art.

7 We also are not informed that the compositions were actually
8 manufactured and tested. The specification is unclear, given the examples
9 are all stated in the present tense and possibly prophetic.

10 Objective evidence of non-obviousness must be commensurate in
11 scope with the claims which the evidence is offered to support. *In re*
12 *Clemens*, 622 F.2d 1029, 1035 (CCPA 1980). The composition tested
13 appears to have only 3% of a pantothenic acid derivative, whereas the claims
14 recite a range of about 0.01% to about 10%. Applicants do not explain how
15 three percent is representative of the claimed range.

16 Similarly, based upon the same specification data discussed, *supra*,
17 we conclude that the Appellants have not established that the Examiner erred
18 in finding motivation to combine the prior art based upon the functional
19 equivalency between pantothenic derivatives described in the prior art.

20 Thus, we do not find error with the Examiner’s conclusion that the
21 claimed invention would have been obvious in view of the combination of
22 Brenner, Beck and Guskey.

23 The Appellants next argue that a *prima facie* case of obviousness has
24 not been established because “Guskey does not teach the employment of
25 panthenyl triacetate.” (Br. p. 6).

1 This argument is without merit. The Appellants cannot overcome an
2 obviousness rejection “by attacking references individually where the
3 rejection is based upon the teachings of a combination of references.” *In re*
4 *Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). It is the cited
5 combination of references which, when considered as a whole, discloses the
6 limitations of claim 2. Beck teaches the use of panthenyl triacetate.
7 Accordingly, the examiner did not err in determining that it would have been
8 obvious to one of ordinary skill in the art at the time of the invention to
9 combine the references to arrive at the claimed invention.

10 B. The Rejection of Claims 2, 4, 11, 13-14, 16, and 18 under 35
11 U.S.C. § 103(a) over the Combination of Trinh and Beck

12 Claims 2, 4, 11, 13-14, 16, and 18 stand rejected under 35 U.S.C.
13 § 103(a) over the combination of Trinh and Beck.

14 The Examiner found that Trinh teaches a personal or cosmetic
15 composition with an enduring perfume in an emulsion form. (Final
16 Rejection, Jan. 29, 2007, p. 9). The Examiner also found that Trinh
17 specifically teaches a deodorant composition having 39.8% cyclomethicone
18 (carrier), 26% aluminum chlorohydrate, perfume, and other components.
19 Furthermore, the Examiner found that Trinh discloses the deodorant
20 composition in a solid or semi-solid form and the use of perfume to provide
21 a good odor to the body. The Examiner also found that Trinh also discloses
22 that the carriers for deodorant compositions, such as solid, semi-solid, and
23 aerosol forms, are well known in the art. (Id. p. 9-10).

24 The Examiner determined that Trinh teaches optional additives,
25 including, panthenol and its derivatives, such as ethyl panthenol, as soothing

1 and skin healing agents. (Final Rejection, Jan. 29, 2007, p. 9). The
2 Examiner also found that Trinh teaches using 0.5-15% petrolatum as an
3 emollient in the composition. (Id. p. 10). Finally, the Examiner found that
4 Trinh does not specifically teach using panthenyl triacetate or using the
5 panthenol derivative in a deodorant composition. (Id.). The Appellants
6 have not challenged these findings in any meaningful way.

7 The Examiner concluded that it would have been obvious to one of
8 ordinary skill in the art at the time the invention was made to combine the
9 teachings of Trinh and Beck by using panthenyl triacetate. (Final Rejection,
10 Jan. 29, 2007, p. 10). The Examiner determined that Trinh's teachings
11 provide motivation to use a pantothenic acid derivative in Trinh's deodorant
12 composition to provide a deodorant that has skin healing and soothing
13 benefits. (Id.).

14 The Examiner also determined that Beck provides motivation to use
15 panthenol derivatives by teaching that panthenol derivatives, including
16 panthenol ethyl ether and panthenyl triacetate, improve skin color and tone.
17 (Id. pp. 10-11). The Examiner also noted that panthenol and its derivatives
18 are anti-inflammatory agents that heal skin by reducing inflammation and
19 redness. (Id. p. 11). Therefore, the Examiner determined that a skilled
20 artisan would have expected similar results in substituting panthenol ethyl
21 ether with its functional equivalent, panthenyl triacetate. (Id.).

22 The Examiner also determined that the recitation "wherein said
23 composition is stable after 24 hours" was inherently described by the
24 combination of Trinh and Beck because this combination comprises all the
25 claimed components in the instant weight percent. (Id.).

Appeal 2008-0581
Application 10/317,339

1 § 103(a) as being unpatentable over the combination of Brenner (US
2 4,055,634), Beck (US 6,551,604), and Guskey (US 5,976,514), and the
3 combination of Trinh (US 5,540,853) and Beck (US 6,551,604) is
4 AFFIRMED.

5 No time period for taking any subsequent action in connection with
6 this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

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