UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STUART BERNARD FRASER and
NEIL FLETCHER TAYLOR

Appeal 2008-3964
Application 11/197,701
Technology Center 1700

Decided: September 30, 2008

Before EDWARD C. KIMLIN, TERRY J. OWENS, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's rejection of claims 1-3, 5, 9, and 11.[1] Although the rejection appealed from is a non-final rejection, we have jurisdiction under

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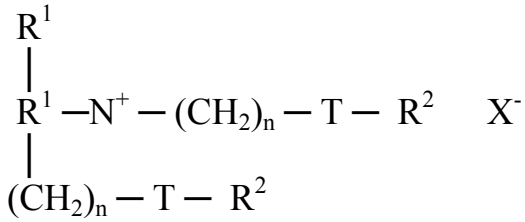
[1] In rendering this decision we have considered the Appellants' arguments presented in the Brief dated August 14, 2007.

35 U.S.C. §§ 6 and 134 since the claims on appeal have been twice presented and rejected. *See Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (BPAI 1998).

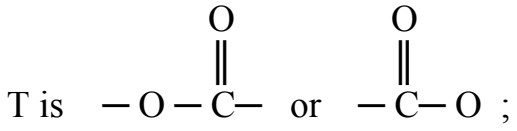
Appellants' invention is directed to clear or translucent fabric conditioning compositions which are stable and incorporate a hydrophobic fluorescer. The present invention seeks to address the problem of providing a clear or translucent liquid fabric conditioning composition comprising a cationic softening compound and a fluorescer which is stable to photodegradation. (Spec. 3). Claim 1 is representative of the invention and is reproduced below:

1. A stable, pourable clear or translucent fabric conditioning composition comprising:

(i) one or more cationic fabric softening materials having an iodine value of from 5 to 140 wherein the cationic fabric softening material is represented by the formula:



wherein each R^1 group is independently selected from C_{1-4} alkyl, hydroxyalkyl or C_{2-4} alkenylgroups; and wherein each R^2 group is independently selected from C_{8-28} alkyl or alkenyl groups;



X^- is any anion compatible with the cationic surfactant and n is 0 or an integer from 1-5;

(iv) one or more oils in an amount of from 20% to 45% by weight of the composition;

(v) one or more hydrophobic fluorescers solubilised in an organic phase of the composition,

wherein the weight ratio of cationic softening material to oil, is in the range 5:l to 1:5.

ISSUES ON APPEAL

Claims 1-3, 5, 9, and 11 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Turner, US patent 6,794,356 B2 issued September 21, 2004, and Harris, EP 0006271 A1 dated January 9, 1980.

The Examiner contends that Turner discloses a stable, pourable clear or translucent fabric conditioning composition comprising: (i) one or more cationic fabric softening materials having an iodine value of from 70 to 140; (ii) polar and non-polar hydrophobic oils solvent extenders; (iii) CPE and RSE ester oil surfactants; (iv) optical brighteners or other brightening or whitening agents. The Examiner contends that Harris discloses textile softening compositions comprising 1-15% of one or more cationic textile softeners and 0.001% to 3% of a nonionic optical brightener. Harris teaches that problems of yellowing associated with cationic surfactants in softening compositions may be overcome by adding nonionic brighteners. The Examiner concludes that it would have been obvious to a person of ordinary skill in the art to use the brighteners of Harris in the compositions of Turner to reduce the yellowing associated with cationic surfactants. (Ans. 3-4).

Appellants contend that there is no guidance in Turner and Harris to arrive at the claimed invention. Appellants contend that Turner and Harris would not have led to picking the specific fabric softening compounds, with

specific critical IV (iodine values), then employ oil in a high amount of from 20%, then pick hydrophobic fluorescer, and then use the specific ratio of the cationic softening compound to the oil as specified by the claimed invention. Appellants contend that there is no guidance in Turner to arrive at these numerous particular selections without the benefit of hindsight.[2] (App. Br. 11).

The issue presented is: did Appellants identify reversible error in the Examiner's rejection of claim 1 under § 103? We answer this question in the negative. The issue turns on whether it would have been obvious to a person of ordinary skill in the art to incorporate a hydrophobic fluorescer brightener in the fabric conditioning compositions of Turner.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter is not patentable within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection.

OPINION

We determine the following Findings of Fact (FF) from the record presented in this appeal:

[2] Appellants have grouped the arguments for claim 1-3, 5, 9, and 11 together. Consequently, the appealed claims stand or fall with independent claim 1. Our analysis will be limited to claim 1.

(1) Turner discloses clear, concentrated stable fabric softening composition comprising from about 1% to about 90% by weight of fabric softening active compounds. (col. 1, ll. 64-66)

(2) Turner discloses preferred softening active compounds include cationic quaternary ammonium compounds that have an IV from about 70 to about 140. (col. 3, l. 27 to col. 4, l. 19).

(3) Turner discloses the composition can comprise oils in amounts ranging up to about 25%.

(4) Turner discloses the composition can include hydrophobic oils in amounts ranging from 0.05% to about 10% as the principle solvent extender. (col. 37, ll. 1-59).

(5) Turner also discloses that up to about 15% by weight of oils are suitable for use as the phase stabilizers in the fabric conditioning compositions in amounts. (col. 23, l. 55 to col. 24, l. 10).

(6) Turner discloses that phase stabilizers are essential to formulating a clear or translucent fabric softener composition. (col. 23, ll. 50-55).

(7) Turner discloses that that an optical brightener or other brightening or whitening agents may be included in the fabric softening composition. (col. 43, ll. 35-37). .

(8) Harris discloses softening detergent compositions comprising cationic quaternary ammonium cationic surfactants. (Pages 6-11)

(9) Harris discloses that yellowing problems associated with the use of cationic surfactants in textile softening detergent compositions can be largely overcome by the selection of certain classes of nonionic brightener. (page 2, ll. 20-24).

(10) Harris discloses suitable brighteners include hydrophilic and hydrophobic materials. (Pages 11-15).

(11) Appellants have not indicated that the hydrophobic brighteners of Harris do not meet the hydrophobic fluorescers of the claimed invention. (*See* App. Br. generally).

Under 35 U.S.C. § 103, the factual inquiry into obviousness requires a determination of: (1) the scope and content of the prior art; (2) the differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) secondary considerations, if any. *See Graham v. John Deere Co.,* 383 U.S. 1, 17-18 (1966). "[A]nalysis [of whether the subject matter of a claim is obvious] need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.,* 127 S. Ct. 1727, 1740-41 (2007). "[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it

would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill." *Id.* *See also DyStar Textilfarben GmBH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1361 (Fed. Cir. 2006) ("The motivation need not be found in the references sought to be combined, but may be found in any number of sources, including common knowledge, the prior art as a whole, or the nature of the problem itself.").

Applying the preceding legal principles to the Factual Findings (FF) in the record of this appeal, we determine that the Examiner has established a prima facie case of obviousness, which prima facie case has not been adequately rebutted by Appellants' arguments. As shown by FF (1-10) above, Turner discloses a stable, clear or translucent fabric conditioning composition comprising one or more cationic quaternary ammonium compounds having an iodine value of from 70 to 140. Turner discloses FF (3-5) the composition can comprise up to about 25% of oils in the form hydrophobic oils solvent extenders and phase stabilizers. Turner also discloses the suitability of incorporating optical brighteners or other brightening or whitening agents in the fabric conditioning composition. Harris teaches that problems of yellowing associated with cationic surfactants in fabric softening compositions may be overcome by adding nonionic brighteners. Harris FF (8-10) discloses textile softening compositions comprising cationic quaternary ammonium textile softeners and hydrophobic nonionic optical brightener. The Examiner properly concluded that it would have been obvious to a person of ordinary skill in the art to use the brighteners of Harris in the compositions of Turner to

reduce the yellowing associated with cationic surfactants. Appellants have not indicated that the hydrophobic brighteners of Harris do not meet the hydrophobic fluorescers of the claimed invention. (S*ee* App. Br. generally).

Appellants argue that there is no incentive for a person of ordinary skill in the art to use both a phase stabilizer and a principal solvent extender and to then select both of these ingredients as being oils. Appellants also argue that Turner gives no indication as to how the optical brightener should be selected or incorporated into the composition. (App. Br. 9-10). Appellants' arguments are not persuasive because Turner discloses the suitability of utilizing oils as a phase stabilizer and solvent extender in fabric conditioning compositions. Turner also discloses the suitability of utilizing optical brighteners in the fabric conditioning compositions. Harris recognized the problems associated with fabric conditioning compositions comprising cationic materials. Harris discloses that these problems are overcome by utilizing hydrophobic optical brighteners. Thus, a person of ordinary skill in the art would have reasonably expected that hydrophobic optical brighteners would have been suitable for use in the fabric conditioning compositions of Turner. A person of ordinary skill in the art would have recognized the proper conditions for incorporating various components, including the hydrophobic optical brighteners, into the fabric conditioning compositions. Appellants have not identified an unexpected result that is achieved by utilizing the combination of components disclosed in the cited prior art. Appellants have also not directed us to evidence, such as evidence of unexpected results, to rebut the Examiner's prima facie case.

For the foregoing reasons and those stated in the Answer, we affirm the rejection presented in this appeal.

ORDER

The rejection of claims 1-3, 5, 9, and 11 under 35 U.S.C. § 103(a) is affirmed.

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

AFFIRMED

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UNILEVER PATENT GROUP
800 SYLVAN AVENUE
AG WEST S. WING
ENGLEWOOD CLIFFS, NJ 07632-3100