

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOSEPH VERNICE and ALFRED R. GLOBUS

Appeal No. 1997-2339
Application No. 08/177,576

ON BRIEF

Before WINTERS, WILLIAM F. SMITH and LORIN, Administrative
Patent Judges.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL

This appeal is from the examiner's decision rejecting claims 1, 3, 5 through 8, and 10 through 16, all the claims remaining in the application. Claim 1 is illustrative of the subject matter on appeal and reads as follows:

1. A clear, transparent, highly stable skin treatment composition in gel form for replenishing moisture in the skin and promoting healing of burned, infected, and irritated skin, comprising the product produced by combining 80-98% by wt.

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polyglyceryl methacrylate containing about 50% water, with about 1-10% by wt. of a silicone in the presence of about 1-10% by wt. of a silicone which is a member selected from the group consisting of cyclomethicone, dimethiconol, dimethicone copolyols and mixtures of cyclomethicone and dimethiconol and dimethicone copolymers thereof in the presence of 1-10% by wt. of an emulsifier under conditions of elevated pressure ranging from about 13,000 to about 50,000 psi.¹

I. REFERENCES

The references relied on by the examiner are:

Georgalas et al. (Georgalas)	4,837,019	Jun. 06,
1989		
Martino et al. (Martino)	5,288,493	Feb. 22,
1994		

II. REJECTION

Claims 1, 3, 5 through 8, and 10 through 16 stand rejected under 35 U.S.C. § 103 as unpatentable over Georgalas and Martino.

On consideration of the record, we reverse the examiner's rejection.

¹ The phrase "in the presence of about 1-10% by weight of a silicone" appears to be redundant. If prosecution is resumed on this subject matter in this application, the examiner should determine whether claim 1 meets the statutory requirements under 35 U.S.C. § 112, second paragraph.

III. DISCUSSION

1. The claims are directed to: (a) a clear, transparent, highly stable skin treatment composition in gel form comprising the product produced by combining 80-98% by weight polyglyceryl

methacrylate containing about 50% water, with about 1-10% by weight of a specified silicone in the presence of 1-10% by weight of an emulsifier under the conditions of elevated pressure ranging from about 13,000 to about 50,000 psi; (b) a method of preparing that composition; and (c) methods of using that composition. The composition recited in each claim on appeal requires at least about 40% by weight polyglyceryl methacrylate.

2. Georgalas is directed to a clear gel skin treatment formulation comprising from about 2 to about 30% by weight of a moisturizing component based on the weight of the entire formulation (column 1, lines 30-40; column 2, lines 58-62; and column 6, lines 3-11). Georgalas discloses that the moisturizing component comprises polyglyceryl methacrylate in an amount within the range of from about 1 to about 10% by

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weight of the moisturizing component (column 2, lines 3-8). Thus, Georgalas' composition comprises at most about 3% by weight of polyglyceryl methacrylate, well below the amount required in the claimed composition. Appellants' arguments that the amounts of polyglyceryl methacrylate in Georgalas' compositions are "a fraction of that used to make the claimed complex" (Brief, page 7, footnote 8) are well taken.

3. Martino does not describe skin care compositions comprising polyglyceryl methacrylate. Accordingly, Martino does not cure the deficiencies of Georgalas.

4. The examiner provides no reason, suggestion, or motivation stemming from the prior art which would have led a person having ordinary skill to a gel formulation comprising 80-98% by weight of polyglyceryl methacrylate containing about 50% water.

5. In resolving questions of obviousness, a decision maker must consider the claimed subject matter as a whole. 35 U.S.C. § 103. Here, the examiner has not adequately considered every limitation in the claims in reaching her

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conclusion of obviousness. The examiner has not explained how a person having ordinary skill in the art would have arrived at the composition recited in each claim on appeal, comprising 80-98% by weight polyglyceryl methacrylate containing about 50% water. Accordingly, the examiner has failed to establish a prima facie case of obviousness.

6. Having determined that the examiner has not established a prima facie case of obviousness, we find it unnecessary to

discuss the Vernice Declaration, executed December 23, 1993, which is relied on by appellants as rebutting any such prima facie case.

IV. CONCLUSION

In conclusion, we reverse the rejection of claims 1, 3, 5 through 8, and 10 through 16 under 35 U.S.C. § 103 as unpatentable over Georgalas and Martino.

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REVERSED

SHERMAN D. WINTERS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
WILLIAM F. SMITH)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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