

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CONOPCO, INC. dba UNILEVER
Petitioner

v.

THE PROCTER & GAMBLE COMPANY
Patent Owner

Case IPR2014-00507
Patent 6,451,300 B1

Before LORA M. GREEN, GRACE KARAFFA OBERMANN, and
RAMA G. ELLURU, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Unilever filed a Petition for an *inter partes* review of claims 6-10, 14, 15, and 21-23 of U.S. Patent No. 6,451,300 B1 (Ex. 1001, “the ’300 patent”). Paper 2 (“the Petition” or “Pet.”). The Procter & Gamble Company (“P&G”), the owner of the ’300 patent, timely filed a Preliminary Response. Paper 8 (“Prelim. Resp.”). We have jurisdiction under 35 U.S.C. § 314. Based on the specific facts presented, we exercise our discretion, and deny review under 35 U.S.C. § 325(d).

A. *Related Matter: Case IPR2013-00509 (“the 509 proceeding”)*

Unilever filed an earlier Petition that sought an *inter partes* review of claims 1-25 of the ’300 patent. *Conopco, Inc. dba Unilever v. The Procter & Gamble Co.*, Case IPR2013-00509 (“IPR2013-00509”), Paper 4 (“the 509 Petition” or “509 Pet.”). We granted review of claims 1-5, 11-13, 16-20, 24, and 25, and denied review of claims 6-10, 14, 15, and 21-23. IPR2013-00509, Paper 10 (“509 Dec. on Inst.”). Unilever filed an unsuccessful Request for Rehearing, seeking reconsideration of our decision denying review of claims 6, 14, and 15. IPR2-13-00509, Paper 12) (Request for Rehearing).

Unilever then filed the instant Petition, challenging the patentability of each claim that was denied review in the 509 proceeding. Pet. 1. Unilever concurrently filed a Motion for Joinder requesting that we join the instant Petition with the 509 proceeding. Paper 3 (“Joinder Mot.”).

B. *The ’300 Patent (Ex. 1001)*

The ’300 patent is directed to a shampoo composition and method for providing a combination of anti-dandruff efficacy and conditioning. Ex. 1001, 2:20-22. According to the ’300 patent Specification, “[t]hese shampoos comprise:

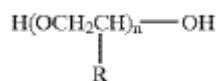
(A) from about 5% to about 50%, by weight, of an anionic surfactant; (B) from about 0.01% to about 10%, by weight, of a non-volatile conditioning agent; (C) from about 0.1% to about 4%, by weight, of an anti-dandruff particulate; (D) from about 0.02% to about 5%, by weight, of at least one cationic polymer; (E) from 0.005% to about 1.5%, by weight, of a polyalkylene glycol; and (F) water.” *Id.* at 2:22-30. The Specification further defines the polyalkylene glycol. *Id.* at 2:30-33.

The Specification sets forth five examples of the inventive shampoo composition. *Id.* at 31:50-33:45. The Specification also describes a method for applying the shampoo to the hair and scalp, which preferably has been wetted with water, in an amount that is effective to confer anti-dandruff efficacy and hair conditioning; the shampoo is thereafter rinsed off. *Id.* at 2:34-37; 31:24-28.

C. Illustrative Claim

Claim 10, which depends from claims 1 and 2, is illustrative of the claimed subject matter. Those claims are reproduced below.

1. A shampoo composition comprising:
 - a) from about 5% to about 50%, by weight of the composition, of an anionic surfactant;
 - b) from about 0.01% to about 10%, by weight of the composition, of a non-volatile conditioning agent;
 - c) from about 0.1% to about 4%, by weight of the composition, of an anti-dandruff particulate;
 - d) from about 0.02% to about 5%, by weight of the composition, of at least one cationic polymer;
 - e) from 0.005% to about 1.5%, by weight of the composition, of a polyalkylene glycol corresponding to the formula:



- i) wherein R is selected from the group consisting of hydrogen, methyl and mixtures thereof;
 - ii) wherein n is an integer having an average value from about 1,500 to about 120,000; and
- f) water.

2. A shampoo composition according to claim 1, wherein said at least one cationic polymer component is selected from the group consisting of guar derivatives, cellulose derivatives, and mixtures thereof.

10. A shampoo composition according to claim 2, wherein said cellulose derivatives have a charge density from about 0.2 meq/g to about 0.6 meq/g.

D. The Asserted Grounds of Unpatentability

In the instant petition, Unilever challenges claims 6-10, 14, 15, and 21-23 of the '300 patent based on the following asserted grounds of unpatentability:

Reference[s]	Basis	Claims challenged
Kanebo ¹ and Cothran ²	§ 103	6-10
Kanebo, Cseh, ³ and Cosmedia ⁴	§ 103	6
Kanebo, Reid, ⁵ and Bartolo ⁶	§ 103	6, 8, 9
Kanebo, Cseh, Sime, ⁷ and Cosmedia	§ 103	6

¹ Kanebo JP 09-188614 (July 22, 1997) (English translation) (Ex. 1006).

² Cothran WO 96/32919 (Oct. 24, 1996) (Ex. 1044).

³ Cseh US 4,676,978 (June 30, 1997) (Ex. 1042).

⁴ Cosmedia® Guar C261 (Product Data Sheet) (Ex. 1040).

⁵ Reid US 5,085,857 (Feb. 4, 1992) (Ex. 1018).

⁶ Bartolo US 5,202,048 (April 13, 1993) (Ex. 1012).

⁷ Sime US 5,037,818 (Aug. 6, 1991) (Ex. 1028).

Reference[s]	Basis	Claims challenged
Kanebo, Cardin, ⁸ and Kalla ⁹	§ 103	14, 15, 22
Kanebo and Bar-Shalom ¹⁰	§ 103	21, 23
Evans ¹¹ and Cothran	§ 103	10
Evans, Cseh, and Cosmedia	§ 103	6, 8, 9

II. ANALYSIS

The standard for instituting an *inter partes* review is set forth in 35 U.S.C.

§ 314(a) as follows:

THRESHOLD -- The Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

As set forth in 35 U.S.C. § 325(d), the Director, and by extension the Board, has broad discretion to deny a petition that raises substantially the same prior art or arguments previously presented to the Office. That statutory provision provides as follows:

In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

⁸ Cardin US 5,104,645 (Apr. 14, 1992) (Ex. 1014).

⁹ Kalla WO 97/026854 (July 31, 1997) (Ex. 1031).

¹⁰ Bar-Shalom US 5,618,798 (Apr. 8, 1997) (Ex. 1034).

¹¹ Evans WO 97/14405 (Apr. 24, 1997) (Ex. 1010).

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