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15/521,787	04/25/2017	Horst ARGEMBEAUX	3321-P50375	8022
13897	7590	04/01/2021	EXAMINER	
Abel Schillinger, LLP 5929 Balcones Drive Suite 300 Austin, TX 78731			PALLAY, MICHAEL B	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* HORST ARGEMBEAUX and ANKE HOFF

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Appeal 2020-001727  
Application 15/521,787  
Technology Center 1600

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Before RICHARD M. LEOVITZ, FRANCISCO C. PRATS, and  
JOHN G. NEW, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 21–39 and 41. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as BEIERSDORF AG of Hamburg, Germany. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to skin cleansing preparations. Claim 21 is illustrative and reads as follows:

21. A skin cleansing preparation, wherein the preparation has an abrasive effect, *comprises less than 5 % of water* and comprises
- (a) one or more lipids,
  - (b) one or more polyols,
  - (c) one or more oil-soluble surfactants,
  - (d) one or more kinds of abrasive particles, and
  - (e) one or more polymeric structurants.

Appeal Br. 18 (emphasis added to show limitation at issue).

REFERENCE(S)

The prior art relied upon by the Examiner is:

Name	Reference	Date
Jutta Franklin et al. (“Franklin”)	US 2016/0067152 A1	Mar. 10, 2016
Denis Alfred Gonzales et al. (“Gonzales”)	US 2013/0039961 A1	Feb. 14, 2013

REJECTION(S)

The following rejections are before us for review:

- (1) Claims 21, 24–26, 33, 34, and 39, under 35 U.S.C. § 102(a)(2) as being anticipated by Franklin (Final Act. 3);<sup>2</sup>
- (2) Claims 21–34, 39, and 41, under 35 U.S.C. § 103 as being unpatentable over Franklin (Final Act. 4–7); and
- (3) Claims 21–39 and 41, under 35 U.S.C. § 103 as being unpatentable over Franklin and Gonzales (Final Act. 7–8).

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<sup>2</sup> Final Office Action entered December 31, 2018.

### ANTICIPATION

In rejecting Appellant’s claims 21, 24–26, 33, 34, and 39 as anticipated, the Examiner cites only to claims 1, 12, and 13 of Franklin. *See* Final Act. 3. In explaining the anticipation rejection, the Examiner does not address the limitation in Appellant’s claim 21 requiring Appellant’s claimed composition to comprise less than 5% of water. *See id.*

Appellant argues, for a number of reasons, that Franklin does not describe a composition that comprises less than 5% water, as recited in Appellant’s claim 21. Appeal Br. 8–11.

The Examiner responds that “claim 13 of Franklin et al., cited in support of the anticipation rejection, does not recite water. Although the specification of Franklin et al. discloses that an aqueous carrier is preferred (paragraphs [0063], [0076]), this means that water is an optional constituent and is not required therein.” Ans. 3.

Therefore, the Examiner finds,

[t]he omission of water from claim 13 of Franklin would lead a person of ordinary skill in the art to immediately envisage a composition likewise omitting water, and disclosure of an optional constituent such as water in the specification of Franklin et al. does not mandate inclusion of water therein.

Ans. 3 (citing *Upsher-Smith Labs., Inc. v. Pamlab, LLC*, 412 F.3d 1319, 1322 (Fed. Cir. 2005)).

We agree with Appellant that the Examiner has not shown sufficiently that Franklin describes a composition that has less than 5% water, as recited in Appellant’s claim 21.

It is well settled that, “[t]o anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently.” *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

In the present case, it is undisputed that Franklin’s claims 1, 12, and 13 do not include any explicit recitations regarding water in the recited compositions. Claims 1, 12, and 13 of Franklin therefore do not include an explicit disclosure of a composition that has less than 5% water, as recited in Appellant’s claim 21, in combination with the other ingredients recited in Appellant’s claim 21. The Examiner, moreover, does not advance a persuasive rationale or evidence explaining specifically why the compositions disclosed in Franklin’s claims 1, 12, and 13 would have been viewed by a skilled artisan as being inherently water-free.

We are not persuaded that, by itself, the absence of any mention of water in Franklin’s claims 1, 12, and 13 amounts to an affirmative disclosure that the compositions described in Franklin’s claims 1, 12, and 13 are necessarily water-free, as the Examiner contends. In the *Upsher* case cited by the Examiner, the anticipating reference included an express disclosure affirmatively stating that the ingredients excluded by the claims under consideration were merely optional. *See Upsher-Smith Labs. v. PamLab*, 412 F.3d at 1322. Here, in contrast, the Examiner does not identify in Franklin’s claims 1, 12, and 13, or anywhere else in the reference, any explicit disclosure affirmatively stating that water is merely an optional ingredient that may be omitted from the described compositions.

Although not cited by the Examiner as support for the prima facie case of anticipation, we acknowledge Franklin’s disclosure that “[a] suitable cosmetic carrier is preferably understood to be an aqueous or aqueous-alcoholic carrier.” Franklin ¶ 76. As Appellant argues, however, all of the examples in Franklin contain significantly more than 5% water. *See id.* ¶¶ 210–220. We are not persuaded that an expressly described preference for an aqueous or aqueous-alcoholic carrier equates to an affirmative

teaching that water is merely an optional ingredient, which may be omitted, particularly when the expressly described preference is viewed alongside Franklin's examples, all of which contain significantly more than 5% water. Because the Examiner does not identify (nor can we discern), any express disclosure affirmatively stating that water is merely an optional ingredient which may be excluded from Franklin's compositions, the Examiner does not persuade us that a skilled artisan would have immediately envisaged the compositions disclosed in Franklin's claims 1, 12, and 13 as being water-free.

In sum, for the reasons discussed, we are not persuaded that the Examiner has shown that Franklin describes a composition having all of the ingredients recited in Appellant's claim 21, and in which the composition has less than 5% of water, as recited in claim 21. We therefore reverse the Examiner's rejection of claim 21 and its dependent claims 24–26, 33, 34, and 39, as being anticipated by Franklin.

#### OBVIOUSNESS

In rejecting claims 21–34, 39, and 41 under § 103 as being unpatentable over Franklin by itself, the Examiner did not explain why Franklin would have made it obvious to prepare a composition having less than 5% water, as recited in claim 21 discussed above. *See* Final Act. 4–7. Nor did the Examiner explain why Franklin would have made it obvious to prepare a composition having all of the ingredients recited in claim 41, the other independent claim on appeal, said composition having less than 1.5% water, as recited in claim 41. *See id.*

Rather, in rejecting Appellant's claims for obviousness over Franklin by itself, the Examiner explained why, based on teachings in Franklin, a

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skilled artisan would have considered the additional ingredients and features recited in Appellant's claims 22–34, 39, and 41 to be obvious variations of the composition described in claims 1, 12, and 13 of Franklin. *See* Final Act. 4–7. In rejecting claims 21–39 and 41 for obviousness over Franklin and Gonzales, the Examiner explained only why it would have been obvious to include sucrose and sodium chloride as abrasive components in Franklin's compositions. *See id.* at 7–8.

Because the Examiner's rejections for obviousness do not advance any reasoning or evidence explaining specifically why a skilled artisan would have considered it obvious to include, in Franklin's composition's, less than 5% water as recited in Appellant's claim 21, or less than 1.5% water as recited in Appellant's claim 41, we are not persuaded that the Examiner has shown that compositions having all of the features recited in Appellant's claims would have been obvious. We therefore also reverse the Examiner's rejections under § 103.

#### CONCLUSION

For the reasons discussed, we reverse all of the Examiner's rejections.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
21, 24–26, 33, 34, 39	102(a)(2)	Franklin		21, 24–26, 33, 34, 39
21–34, 39, 41	103	Franklin		21–34, 39, 41
21–39, 41	103	Franklin, Gonzales		21–39, 41
<b>Overall Outcome</b>				21–39, 41

REVERSED