

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 IPR2013-00509
Patent 6,451,300 B1

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

OBERMANN, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.C.S. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. Background

Conopco, Inc. dba Unilever (“Petitioner”), filed a Petition requesting an *inter partes* review of claims 1–25 of U.S. Patent No. 6,451,300 B1 (Ex. 1001, “the ’300 patent”). Paper 2 (“Pet.”). The Procter & Gamble Company (“Patent Owner”) filed a Preliminary Response. Paper 8. In a Decision on Institution (Paper 10, “Dec.”), we instituted trial on three grounds of unpatentability as set forth in the chart below.

Reference	Basis	Claims Challenged
Kanebo ¹	§ 102(b)	1, 2, 4, 5, 11, 13, 16, 17, and 20
Kanebo	§ 103	3, 18, and 25
Evans ²	§ 103	1, 12, 16, 19, and 24

Within the time periods allowed by our rules, Patent Owner filed a Response and Petitioner filed a Reply. Paper 35 (“PO Resp.”); Paper 45 (“Reply”). The parties also fully briefed Patent Owner’s Motion to Exclude Evidence. Paper 54 (“PO Mot. Ex.”); Paper 55 (“PO Mot. Ex. Resp.”); Paper 56 (“PO Mot. Ex. Reply”).

A combined oral hearing was conducted on November 5, 2014, in this proceeding and IPR2013-00505, which relates to U.S. Patent No. 6,974,569 B2, (“the 505 Proceeding”), and involves the same parties. Paper 60 (“Tr.”). Concurrently herewith, we issue a Final Written Decision in the 505 Proceeding.

¹ Kanebo, JP 9-188614 (July 22, 1997) (English translation) (Ex. 1006).

² Evans, WO 97/14405 (Apr. 24, 1997) (Ex. 1010).

We have jurisdiction under 35 U.S.C. § 6(c). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73. For the reasons set forth below, we determine that Petitioner has demonstrated, by a preponderance of the evidence, the unpatentability of claims 1–5, 11–13, 16–20, 24, and 25.

Specifically, a preponderance of the evidence demonstrates that:

(1) claims 1, 2, 4, 5, 11, 13, 16, 17, and 20 are anticipated by Kanebo under 35 U.S.C. § 102(b);

(2) claims 3, 18, and 25 are unpatentable over Kanebo under 35 U.S.C. § 103; and

(3) claims 1, 12, 16, 19, and 24 are unpatentable over Evans under 35 U.S.C. § 103.

B. Related Proceedings

The '300 patent is the subject of co-pending district court litigation initiated after the filing of the Petition. *See Procter & Gamble Co. v. Conopco, Inc.*, 1:13-cv-00732-TSB (S.D. Ohio) (filed Oct. 10, 2013). Petitioner also filed a second petition seeking *inter partes* review of claims 6–10, 14, 15, and 21–23 of the '300 Patent, which we denied. IPR2014-00507, Paper 17 (denying review).

C. The '300 Patent

The '300 patent is directed to a shampoo composition and method for providing a combination of anti-dandruff efficacy and hair conditioning. Ex. 1001, 2:20–22. According to the '300 patent specification,

“[t]hese shampoos compositions 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 the

composition, 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 also sets forth five examples of the claimed shampoo composition. *Id.* at 31:50–33:45. The specification 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 thereafter is rinsed off. *Id.* at 2:34–37, 31:24–28.

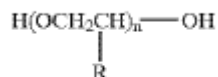
D. Illustrative Claim

The independent claims—claims 1 and 19—specify a shampoo composition comprising an anionic surfactant, a non-volatile conditioning agent, an anti-dandruff particulate, a cationic polymer, and a polyalkylene glycol. Weight-percent ranges are specified for the components.

Claim 1, reproduced below, is illustrative of the claimed subject matter.

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.

II. ANALYSIS

A. Claim Construction

In an *inter partes* review proceeding, we give claim terms in unexpired patents their broadest reasonable interpretation in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b). Under that standard, we assign claim terms their ordinary and customary meaning, as understood by a person of ordinary skill in the art, in the context of the entire patent disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). If an inventor acts as his or her own lexicographer, the definition must be set forth in the specification with reasonable clarity, deliberateness, and precision. *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed. Cir. 1998).

The independent claims—claim 1 and 19—specify a shampoo composition comprising each required ingredient in an amount that falls within specified weight-percent ranges. Neither party advances a special meaning for any claim term. Claims 13 and 19 require a “zinc salt of 1-hydroxy-2-pyridinethione.” Petitioner argues, and Patent Owner does not contest effectively, that the terms “zinc salt of 1-hydroxy-2-pyridinethione” and “zinc pyrithione” interchangeably refer to the same chemical component. Pet. 5 (citing Ex. 1001, 16:55–59, 32:30–51 & n.4; Ex. 1003 ¶ 17); *see generally* PO Resp. On this record, we construe each claim term according to its ordinary and customary meaning, consistent with the specification, and determine that no term needs further interpretation for the purpose of rendering this Final Written Decision.

B. Anticipation of Claims 1, 2, 4, 5, 11, 13, 16, 17, and 20 by Kanebo

Petitioner's claim charts, substantive arguments, and supporting Declaration of Arun Nandagiri³ show sufficiently that Kanebo in Example 10 describes a shampoo composition comprised of components in weight-percent ranges that meet the limitations of claims 1, 2, 4, 5, 11, 13, 16, 17, and 20.⁴ Pet. 10–18; Ex. 1003 ¶¶ 35–47, 50–60, 62–63; Ex. 1006 ¶ 37 (Kanebo Example 10).

Regarding claim 13, which depends from claim 1 and further requires that “said anti-dandruff particulate is a zinc salt of 1-hydroxy-2-pyridinethione,” we find that the “zinc pyrithione” in Kanebo's Example 10 (Ex. 1006 ¶ 37) is a synonym for the zinc salt required by claim 13. Pet. 12, 14; Ex. 1003 ¶¶ 39, 40; see Pet. 5 (citing Ex. 1001, 16:55–59, 32:30–51 & n.4; Ex. 1003 ¶ 17). For example, the two terms are used interchangeably in the specification of the '300 patent, which identifies both as the same chemical compound, designated as “ZPT.” Ex. 1001, 16:55–59, 31:41–45, 32:30–51 & n.4; see Ex. 1003 ¶¶ 17, 56–57 (explaining the disclosures, relating to ZPT, in the '300 patent).

Claim 20, moreover, recites “[a] method for providing anti-dandruff efficacy and conditioning hair” and requires “a) wetting said hair with water; b) applying to

³ Petitioner's witness, Dr. Nandagiri, has over 30 years of experience formulating shampoos, and in that capacity, has “been personally involved in the formulation of hundreds of hair care products.” Ex. 1003 ¶ 4. Dr. Nandagiri has significant experience formulating and testing both conditioning and anti-dandruff shampoos. *Id.* ¶¶ 5–7, 9. Dr. Nandagiri has the requisite familiarity with shampoo formulation and testing to opine on the views of a hypothetical person of ordinary skill in the art. See *id.* ¶¶ 4–10. We find his testimony credible and persuasive.

⁴ In our decision to institute, we expressly denied trial as to claim 3 based on anticipation by Kanebo. Dec. 9–10. We decline to consider Petitioner's further argument, stated in the Reply brief, that claim 3 is anticipated by Kanebo. Reply 2.

said hair an effective amount of a shampoo composition according to claim 1; and c) rinsing said shampoo composition from said hair using water.” Ex. 1001, 35:11–17. Kanebo discloses an evaluation of the composition of Example 10 that involves assessing “usability upon rinsing.” Ex. 1006 ¶ 38. Kanebo further discloses a method for evaluating shampoo that involves hair that is “washed . . . followed by rinsing.” Ex. 1006 ¶ 21; *see* Ex. 1003 ¶¶ 62–63.

Patent Owner advances no arguments or evidence responsive to the anticipation ground based on Kanebo. *See* PO Resp. 12–13 (electing to exclude the anticipation ground from the statement of issues); *see generally id.* (limiting argument to obviousness grounds based on Kanebo and Evans). Furthermore, Patent Owner’s witness, Dr. Robert Y. Lochhead, states no opinion about the underlying facts surrounding the anticipation ground, nor does he opine upon the ultimate conclusion that Kanebo teaches each and every limitation of the claims challenged in the anticipation ground. Ex. 2015 ¶ 27 (sole paragraph that addresses anticipation, stating general principles of law); *id.* ¶¶ 32, 67 (limiting opinions to the obviousness grounds set for trial).⁵

⁵ Exhibit 2015 is a declaration of Patent Owner’s witness, Dr. Robert Y. Lochhead, filed July 25, 2014. Dr. Lochhead has been employed in academia for about 25 years and has significant experience practicing and teaching in the field of polymer chemistry. Ex. 2015 ¶¶ 6–7, 9. We are persuaded that Dr. Lochhead is an expert in polymer chemistry. His level of experience directly related to formulating shampoos, however, is less clear. He states that “some” of the 24 patents and applications in which he is named as an inventor “relate to shampoo compositions.” *Id.* ¶ 8. He states that he has “consulted widely for the personal care industry, particularly in fields of chemistry, polymer chemistry, and other industrial chemical applications.” *Id.* ¶ 11. He also states that he has “authored alone, or with colleagues, a number of articles and book chapters” that relate to shampoo formulations, without identifying particular individual contributions that he made to that work. *Id.* ¶ 12.

We have considered the evidence of the whole record, and conclude that a preponderance of the evidence supports a conclusion that claims 1, 2, 4, 5, 11, 13, 16, 17, and 20 are anticipated by Kanebo under 35 U.S.C. § 102(b).

C. Obviousness of Claims 3, 18, and 25 over Kanebo

We first turn to claim 3, which indirectly depends from claim 1. Ex. 1001, 34:5–7. Claim 1 requires “at least one cationic polymer,” and claim 2, which depends from claim 1, further requires a cationic polymer that is selected from a group defined as “guar derivatives, cellulose derivatives, and mixtures thereof.” *Id.* at 33:55; 34:1–5. Claim 3 depends from claim 2, and limits the recited “guar derivatives” to “guar hydroxypropyltrimonium chloride.” *Id.* at 34:5–7. Kanebo’s Example 10 teaches each component of the shampoo composition required by claim 3, but for that specified guar derivative. Ex. 1006 ¶ 37.

A preponderance of the evidence persuades us that cationic polymers are included in shampoo formulations to “help achieve conditioning efficacy”; in fact, Patent Owner’s own witness recognizes that function of cationic polymers in shampoo compositions. Ex. 2015 ¶ 52 (citing Ex. 1006 ¶ 14); *see* Pet. 15–17; Ex. 1003 ¶¶ 48–49, 62–63; Ex. 1034 ¶¶ 29–30. Petitioner advances evidence (Ex. 1003 ¶ 49) that the specific cationic polymer (guar hydroxypropyltrimonium chloride) required by claim 3 is a component in Kanebo’s Example 8 (Ex. 1006 ¶ 31 n.*2), and, further, that the specified guar derivative is an art-recognized, interchangeable alternative for the cationic polymer (the cationized cellulose derivative) employed in Kanebo’s Example 10. Pet. 15–16; *see* Ex. 1006 ¶ 14 (preferred cationic polymers include cationized cellulose derivative and cationized guar gum derivative), ¶ 37 (disclosing use of cationized cellulose derivative in Example 10); *see also* Ex. 1003 ¶ 49 (explaining Kanebo’s disclosure); Ex. 1034

¶¶ 29–32 (explaining interchangeability of cationic polymers in Kanebo’s Examples 8 and 10). Based on the whole record developed during trial, we are persuaded that Kanebo on its face evidences the interchangeability of the specified guar derivative (disclosed in Example 8) for the cationized cellulose derivative (disclosed in Example 10).

Patent Owner counters that the guar and cellulose derivatives disclosed in Kanebo were not recognized as interchangeable components in a shampoo formulation. Ex. 2015 ¶¶ 49–55. Specifically, Patent Owner advances the testimony of Dr. Lochhead, who points out that Kanebo’s Example 8, which includes the specified guar derivative, does not include also an anti-dandruff agent. Dr. Lochhead, however, provides no persuasive reason why that fact diminishes a conclusion that the guar derivative of Example 8 would have been recognized as interchangeable with the cationized cellulose of Kanebo’s Example 10 for the common function of improved conditioning. *Id.* ¶ 52.

Dr. Lochhead states also that the shampoo of Kanebo’s Example 10 already exhibits “excellent” conditioning properties; therefore, one would not have been prompted to add (or swap in) to that formulation another cationic polymer, such as the specified guar derivative disclosed in Example 8. *Id.* ¶ 53. That argument is unpersuasive because, where two known alternatives are interchangeable for a desired function, an express suggestion to substitute one for the other is not needed to render a substitution obvious. *In re Fout*, 675 F.2d 297, 301 (CCPA 1982); *In re Siebentritt*, 372 F.2d 566, 568 (CCPA 1967); see *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (indicating that a claim is obvious if it is no “more than the predictable use of prior art elements according to their established functions,” even without an express suggestion to combine).

Dr. Lochhead also suggests that Petitioner was required, in the Petition, to establish that the proposed substitution “would have resulted in a composition that forms a coacervate upon aqueous dilution.” Ex. 2015 ¶ 54. Petitioner replies, persuasively, that none of the claims require a coacervate. Reply 7. In any event, a preponderance of the evidence persuades us that “cationic guar and cellulose derivatives were recognized deposition aids that had been in use for decades prior to the ‘300 patent,” and that “their interchangeability and functions in [anti-dandruff] conditioning shampoos” were known at the time of the invention. Reply 4; Ex. 1034 ¶ 31; *see also id.* ¶¶ 29–32 (opinions of Dr. Nandagiri, and objective support cited therein, regarding the interchangeability of the two cationic polymers). On that point, we credit Dr. Nandagiri’s testimony, “that coacervates formed from anionic surfactants and guar or cellulose derivatives were discovered in the 1970s and 1980s,” and that the guar derivative disclosed in Kanebo’s Example 8, and required by claim 3, “was particularly well known and widely used in shampoos prior to the ‘300 patent.” Ex. 1034 ¶¶ 31–32 (and objective support cited therein).

Based on the evidence of record, we conclude that a person of ordinary skill in the art would have understood that the guar derivative in Kanebo’s Example 8 (and specified in claim 3) is an interchangeable alternative for the cellulose derivative disclosed in Kanebo’s Example 10. Pet. 16. A preponderance of the evidence persuades us, therefore, that the subject matter of claim 3 would have been obvious over Kanebo.

We next turn to claims 18 and 25, which require ethylene glycol distearate (“EGDS”) as a suspending agent. The crux of the dispute surrounding those

claims is whether one would have been prompted to substitute EGDS for the ethylene glycol dimyristate (“EGDM”), which is disclosed as a pearlescent agent in Kanebo’s Example 10. Ex. 1006 ¶ 37. A preponderance of the evidence shows that EGDS and EDGM were known at the time of the invention, not only as equivalent pearlescent agents, but also as equivalent suspending agents. Ex. 1034 ¶ 34. Both ingredients appear in lists of preferred glycerol esters in Kanebo’s general disclosure (Ex. 1006 ¶ 16), and in the ’300 patent specification (Ex. 1001 26:12–16). Pet. 17 (citing Ex. 1003 ¶ 61).

We have considered Patent Owner’s evidence, advanced in support of the argument that EGDS and EDGM would not have been recognized as interchangeable in a shampoo formulation. PO Opp. 16–19. On that point, however, we credit the testimony of Petitioner’s witness, Dr. Nandagiri, over that of Patent Owner’s witness, Dr. Lochhead. *Compare* Ex. 1003 ¶ 61 (Dr. Nandagiri’s declaration testimony), *with* Ex. 2015 ¶ 45 (Dr. Lochhead’s declaration testimony).⁶ Both ingredients are linear fatty acid glycol diesters—EGDS is used in six of Kanebo’s shampoo formulations, whereas EDGM is used in five—thus underscoring their interchangeability. Reply 4–5; Ex. 1006 ¶¶ 16, 31, 37–38; Ex. 1034 ¶ 33. A preponderance of the evidence persuades us that it would have been obvious at the time of the invention to substitute EGDS for

⁶ Dr. Nandagiri has worked extensively in the field of shampoo formulation and testing for over 30 years. Ex. 1003 ¶¶ 4–10; Ex. 1004 (curriculum vitae). Patent Owner directs us to no persuasive evidence that Dr. Lochhead has had any significant experience formulating or testing shampoos after about 1990. Ex. 2015 ¶¶ 5–12; Ex. 2016 (curriculum vitae). Where their testimony conflicts, we find that Dr. Nandagiri’s opinions, regarding the state of the art in 1999, are more credible than those of Dr. Lochhead. *See supra* notes 3, 5.

EDGM in the shampoo composition described in Kanebo's Example 10 and, thereby, attain the subject matter of claims 18 and 25. Pet. 17, 19; Ex. 1001, 26:12–16; Ex. 1003 ¶ 61; Ex. 1006 ¶¶ 16, 37; Ex. 1034 ¶¶ 33–36.

In Patent Owner's view, Petitioner fails to show sufficiently why an ordinary artisan would have been prompted to make the proposed substitutions of ingredients in Kanebo. PO Resp. 13–14. The only substitutions necessary, however, involve the exchange, or swapping, of interchangeable ingredients, which were known to serve the same function in a shampoo formulation. Where two known alternatives are interchangeable for a desired function, an express suggestion to substitute one for the other is not needed to render a substitution obvious. *In re Fout*, 675 F.2d at 301; *In re Siebentritt*, 372 F.2d at 568; see *KSR Int'l Co.*, 550 U.S. at 417. That same settled principle of patent law undercuts Patent Owner's further argument—that the obviousness ground “fail[s] because [Petitioner] points to no flaws or shortcomings in the disclosure of Kanebo that would have motivated [a person of ordinary skill in the art] to modify it.” PO Resp. 15.

Patent Owner's further argument, that Kanebo and the '300 patent focus on solving different problems, is not supported by a preponderance of the evidence. PO Resp. 14–15. Kanebo's Example 10 discloses an anti-dandruff, conditioning shampoo formula; thus, Patent Owner's suggestion that Kanebo falls outside the range of relevant prior art is unpersuasive. Ex. 1006 ¶ 37 (Kanebo's Example 10).

Based on the evidence of the whole record, we are persuaded that Petitioner has shown by a preponderance of the evidence that the subject matter of claims 3, 18, and 25 would have been obvious over Kanebo.

D. Obviousness of Claims 1, 12, 16, 19, and 24 over Evans

Petitioner's claim charts, substantive arguments, and Declaration of Dr. Nandagiri show sufficiently that claims 1, 12, 16, 19, and 24 would have been obvious over Evans. Pet. 38–46; Ex. 1003 ¶¶ 84–90 (and citations therein to Ex. 1010 (Evans)).⁷ In particular, Petitioner directs us to credible evidence from which we find that Evans discloses a shampoo formulation comprising components in ranges that meet, are subsumed by, or overlap the ranges specified in those claims. Pet. 38–46. Patent Owner raises no evidence that casts any reasonable doubt on that finding. PO Resp. 22–23. We conclude that, to the extent that the weight-percent range stated in those claims for any shampoo ingredient is critical, a desire to identify in Evans's composition the optimal or workable range, by routine experimentation, would have led a skilled artisan to the specified range. Pet. 41–42 (citing Ex. 1003 ¶ 86).

Patent Owner raises two arguments in an attempt to counter that conclusion. We find both unpersuasive. First, Patent Owner submits that Evans solves a problem unrelated to the anti-dandruff efficacy that is of concern in the '300 patent. PO Resp. 22–23. Yet, Patent Owner observes that Evans discloses the use of optional anti-dandruff agents in a conditioning shampoo. *Id.* at 23; Ex. 1010, 28–29⁸ (Evans, disclosing “anti-dandruff aids” and “antidandruff agents such as pyridinethione salts”). On this record, we are persuaded that a preponderance of evidence supports a finding that Evans addresses anti-dandruff efficacy, and is within the scope of the relevant prior art.

⁷ Here again, where their testimony conflicts, we find that Dr. Nandagiri's opinions are more credible than those of Dr. Lochhead. *See supra* notes 3, 5, 6.

⁸ We refer to the numbers centered on the bottom of the pages of this exhibit.

Second, Patent Owner submits that one would arrive at the subject matter of claims 1, 12, 16, 19, and 24 only “by cherry picking from various disclosures of Evans with the aid of hindsight.” PO Resp. 24. In particular, Patent Owner takes issue with the fact that some of the ingredients required by the challenged claims are described as optional in Evans. *Id.* at 25–27. Those arguments are not persuasive in light of the record developed at trial. Specifically, we agree with Petitioner that the disclosure of Evans is not limited to its working examples; nor is Evans’s disclosure “isolated or unrelated” to a patent, incorporated therein by reference—that is, U.S. Patent No. 3,962,418 (“the ’418 patent”)—which “identifies cationized cellulose derivatives as useful cationic polymers in amounts . . . encompassed by” the limitations of claim 1 and 19. Reply 9 (and citations to the record therein); Pet. 39–40 (claim chart); Ex. 1010, 25:6–9 (Evans, incorporating by reference the description of suitable cellulose ethers provided in the ’418 patent); Ex. 1011, 3:5–9 (the ’418 patent, disclosing suitable cellulose ethers that meet the limitations of claims 1 and 19); Ex. 1034 ¶ 43 (explaining the significance of the disclosures of Evans and the ’418 patent, from the viewpoint of a person of ordinary skill in the art at the time of the invention).

We determine that the shampoo composition specified in the challenged claims is an obvious variant of the shampoo disclosed in Evans, and contributes no “more than the predictable use of prior art elements according to their established functions.” *KSR Int’l Co.*, 550 U.S. at 417; *cf. In re Mayne*, 104 F.3d 1339, 1340 (Fed. Cir. 1997) (substitution of one known element for a known equivalent is *prima facie* obvious). Based on the evidence of the whole record, we conclude that claims 1, 12, 16, 19, and 24 are unpatentable as obvious over Evans under 35 U.S.C. § 103.

E. Patent Owner's Motion to Exclude

The party moving to exclude evidence bears the burden of proving that it is entitled to the relief requested—namely, that the material sought to be excluded is inadmissible under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.20(c), 42.62(a).

Patent Owner seeks to exclude evidence that, in Patent Owner's view, violates our rule against incorporation by reference, exceeds the permissible scope of reply or rebuttal evidence, and raises new issues or belatedly presents evidence. PO Mot. Ex. 1; *see generally id.* at 1–6. To the extent that any such violations have occurred, we decline to consider such evidence in reaching our decision.

A motion to exclude, however, is not an appropriate vehicle for challenging a reply, or a reply's supporting evidence, as exceeding the scope of a proper reply. *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, Case CBM2012-00002, slip op. at 62 (PTAB Jan. 23, 2014) (Paper 66); *Norman Int'l, Inc. v. Andrew Toti Testamentary Trust*, Case IPR2014-00283, slip op. at 2 (PTAB Jan. 22, 2015) (Paper 33). The purpose of a motion to exclude is to challenge admissibility of evidence. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012); Paper 41, 1–2.

We have considered, but find unpersuasive, Patent Owner's additional arguments as to the authenticity of Exhibit 1040. PO Mot. Ex. 6–8. Exhibit 1040 was authenticated by its author, Dr. Lochhead, during his deposition. *See* PO Mot. Ex. Resp. 8; Ex. 1037, 56:25–57:21.

At Petitioner's request, and based on the representation that they were filed in "inadvertent error," we order expunged from the record Exhibits 1045, 1051, and 1060. PO Mot. Ex. Resp. 9.

We have fully considered the positions of the parties relating to the remaining evidentiary issues. *See generally* PO Mot. Ex.; PO Mot. Ex. Resp.; PO Mot. Ex. Reply. For reasons stated by Petitioner, we decline to exclude evidence in this proceeding. PO Mot. Ex. Resp. 1–10.

Accordingly, Patent Owner’s Motion to Exclude Evidence is denied. Exhibits 1045, 1061, and 1060 are expunged from the record.

III. CONCLUSION

Petitioner has demonstrated, by a preponderance of the evidence, that claims 1–5, 11–13, 16–20, 24, and 25 of the ’300 patent are unpatentable as follows:

(1) claims 1, 2, 4, 5, 11, 13, 16, 17, and 20 are anticipated by Kanebo under 35 U.S.C. § 102(b);

(2) claims 3, 18, and 25 are unpatentable over Kanebo under 35 U.S.C. § 103; and

(3) claims 1, 12, 16, 19, and 24 are unpatentable over Evans under 35 U.S.C. § 103.

IV. ORDER

It is

ORDERED that claims 1–5, 11–13, 16–20, 24, and 25 of the ’300 patent are *unpatentable*;

FURTHER ORDERED that Patent Owner’s Motion to Exclude Evidence is *denied*;

FURTHER ORDERED that Exhibits 1045, 1061, and 1060 are *expunged* from the record; and

FURTHER ORDERED that, because this is a Final Written Decision, the parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

IPR2013-00509
Patent 6,451,300 B1

For Petitioner:

Joseph Meara
Michael Houston
Jeanne Gills
FOLEY & LARDNER LLP
jmeara-PGP@foley.com
mhouston@foley.com
jmgills@foley.com

For Patent Owner:

David Maiorana
John V. Biernacki
Michael Weinstein
JONES DAY
dmaiorana@jonesday.com
jvbiernacki@jonesday.com
trgoots@jonesday.com
msweinstein@jonesday.com

Steven Miller
Carl Roof
Angela Haughey
THE PROCTER & GAMBLE COMPANY
miller.sw@pg.com
roof.cj@pg.com
haughey.a@pg.com