

Filed on behalf of L'Oreal USA, Inc.

By: Michelle E. O'Brien

Timothy J. Murphy

THE MARBURY LAW GROUP, ^{PLLC}

11800 Sunrise Valley Drive

15th Floor

Reston, VA 20191

Tel: (703) 391-2900

Fax: (703) 391-2901

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**PETITION FOR POST-GRANT REVIEW
OF U.S. PATENT NO. 9,498,419**

Mail Stop PATENT BOARD

Patent Trial and Appeal Board

U.S. Patent & Trademark Office

P.O. Box 1450

Alexandria, VA 22313-1450

TABLE OF CONTENTS

I. Mandatory Notices (37 C.F.R. § 42.8(a)(1))	1
II. Grounds for Standing (37 C.F.R. § 42.204(a))	3
III. Identification of Challenge (37 C.F.R. § 42.204(b))	3
A. Statutory Grounds for Challenge	3
IV. The '419 Patent	4
A. Overview of the '419 patent	4
B. Level of Ordinary Skill in the Art	4
C. Claim Construction	5
1. "Hair coloring agent"	6
2. "The mixture does not contain"	20
3. Summary of proposed claim construction	25
V. Grounds of Rejection	28
A. GROUND 1: Claims 1-10 are Indefinite Under 35 U.S.C. § 112(b)	29
1. Legal standard	29
2. The exclusion of hair coloring agents from the bleaching formulation in claim 1 renders claims 1-10 indefinite	30
3. The term "the formulation" renders claims 4 and 5 indefinite	32
B. GROUND 2: Claims 1-10 are Invalid Under 35 U.S.C. § 112(a) as Lacking Adequate Written Description Support	35
1. Legal standard	35
2. Claims 1-10 are not supported by the as-filed specification	36
3. Claim 7 is not supported by the specification	39
C. GROUND 3: Claims 1-10 are Invalid Under 35 U.S.C. § 112(a) as Lacking Enablement	40
1. Legal standard	40

..

2. The bleaching method of claims 1-10 is not enabled by the as-filed specification41

- a. The quantity of experimentation necessary.....44
- b. The amount of direction or guidance presented.....44
- c. The presence or absence of working examples.....45
- d. The nature of the invention45
- e. The state of the prior art46
- f. The relative skill of those in the art.....46
- g. The predictability or unpredictability of the art47
- h. The breadth of the claims48

VI. Scrivener Errors Cannot Be Overcome Through Claim Construction49

VII. Conclusion51

...

TABLE OF AUTHORITIES

Cases

<i>Allen Eng'g Corp. v. Bartell Indus.</i> , 299 F.3d 1336 (Fed. Cir. 2002)	30
<i>Amgen, Inc. v. Chugai Pharm. Co.</i> , 927 F.2d 1200 (Fed. Cir. 1991)	40
<i>Ariad Pharms., Inc. v. Eli Lilly & Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010)	35, 38
<i>Becton Dickinson & Co. v. C.R. Bard Inc.</i> , 922 F.2d 792 (Fed. Cir. 1990)	28
<i>Biovail Labs. Int'l SRL v. Intelgenx Corp.</i> , 2010 U.S. Dist. LEXIS 136465 (D. Del. Dec. 27, 2010)	24
<i>Biovail Labs., Inc. v. Anchen Pharms., Inc.</i> , 2006 U.S. Dist. LEXIS 37996 (C.D. Cal. Feb. 8, 2006)	24
<i>Bose Corp. v. JBL, Inc.</i> , 274 F. 3d 1354 (Fed. Cir. 2001)	30
<i>Boston Sci. Corp., et al. v. Johnson & Johnson, Inc.</i> , 647 F.3d 1353 (Fed. Cir. 2011).	36
<i>Chef America, Inc. v. Lamb-Weston, Inc.</i> , 358 F.3d 1371, (Fed. Cir. 2004)	26, 27, 49, 50
<i>Computer Docking Station Corp. v. Dell, Inc.</i> , 519 F.3d 1366, 1375 (Fed. Cir. 2008)	19
<i>Cordis Corp. v. Medtronic AVE, Inc.</i> , 339 F.3d 1352 (Fed. Cir. 2003)	16
<i>Cuozzo Speed Techs., LLC v. Lee</i> , 136 S. Ct. 2131(2016)	5

<i>Datamize LLC v. Plumtree Software, Inc.</i> , 417 F.3d 1342 (Fed. Cir. 2005)	18
<i>Imaginal Systematic, LLC v. Leggett & Platt, Inc.</i> , 805 F.3d 1102 (Fed. Cir. 2015)	15, 23, 26, 27
<i>In re Oetiker</i> , 951 F. 2d 1267 (Fed. Cir. 1991)	30
<i>In re Packard</i> , 751 F.3d 1307 (Fed. Cir. 2014)	29, 30
<i>In re Papesch</i> , 315 F.2d 381 (C.C.P.A. 1963).....	14
<i>In re Paulsen</i> , 30 F.3d 1475 (Fed. Cir. 1994)	5
<i>In re Wands</i> , 858 F.2d 731(Fed. Cir. 1988).....	40, 48
<i>In re Zletz</i> , 893 F.2d 319 (Fed. Cir. 1989)	5
<i>Interval Licensing LLC v. AOL, Inc.</i> , 766 F.3d 1364 (Fed. Cir. 2014)	18
<i>Nautilus, Inc. v. Biosig Instruments, Inc.</i> , 134 S. Ct. 2120 (2014)	18
<i>Omega Eng'g, Inc. v. Raytek Corp.</i> , 334 F.3d 1314, (Fed.Cir.2003)	16
<i>Process Control Corp. v. Hydrexclaim Corp.</i> , 190 F.3d 1350 (Fed. Cir. 1999)	26, 30, 49
<i>Storage Tech. Corp. v. Cisco Sys., Inc.</i> , 329 F.3d 823 (Fed. Cir.2003)	16
<i>Telebrands Corp. v. Tinnus Enters., LLC</i> ,	

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.