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Paper 119  
Entered: December 9, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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L'ORÉAL USA, INC.,  
Petitioner,

v.

LIQWD, INC.,  
Patent Owner.

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Case PGR2017-00012  
Patent 9,498,419 B2

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Before LORA M. GREEN, CHRISTOPHER M. KAISER, and  
MICHELLE N. ANKENBRAND, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
35 U.S.C. § 328(a) and 37 C.F.R. § 42.73

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INTRODUCTION

*A. Background*

L’Oréal USA, Inc. (“Petitioner”) filed a Petition requesting post-grant review of claims 1–8 and 10 of U.S. Patent No. 9,498,419 B2 (Ex. 1001, “the ’419 patent”). Paper 2 (“Pet.”). Liqwd, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 7 (“Prelim. Resp.”). We instituted trial on two of the grounds asserted in the Petition. Paper 17 (“Inst. Dec.”). After the Supreme Court’s decision in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018), we also instituted on the remaining ground presented in the Petition. Paper 97.

After we instituted trial, Patent Owner filed a Response (Paper 44, “PO Resp.”), and Petitioner filed a Reply (Paper 55). Patent Owner filed Observations on Cross-Examination of Petitioner’s Reply Witnesses. Paper 77 (“PO Obs.”). Patent Owner filed a Supplemental Response addressing the ground added to the trial after *SAS*, and Petitioner filed a Supplemental Reply. Paper 100 (“Supp. Resp.”); Paper 101 (“Supp. Reply”). In addition, both parties filed Motions to Exclude Evidence. Paper 72 (“PO Mot.”); Paper 73 (“Pet. Mot.”). On the request of both parties, we held an oral hearing, and the transcript of that hearing is in the record. Paper 98.

We have jurisdiction under 35 U.S.C. § 6, and we issue this Final Written Decision pursuant to 35 U.S.C. § 328(a) and 37 C.F.R. § 42.73. We conclude that Petitioner has established by a preponderance of the evidence that each of claims 1–8 and 10 of the ’419 patent is unpatentable.

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*B. Related Matters*

The parties identify *Liqwd, Inc. v. L’Oreal USA, Inc.*, No. 1:17-cv-00014 (D. Del.), as a pending infringement suit asserting the ’419 patent. Pet. 8; Paper 4, 1. The ’419 patent also was challenged in a separate petition for post-grant review, which was assigned case number PGR2017-00011. We denied institution of review in that proceeding. *L’Oréal USA, Inc. v. Liqwd, Inc.*, Case PGR2017-00011, slip op. at 16 (PTAB July 19, 2017) (Paper 24).

*C. The Asserted Grounds of Unpatentability*

We instituted trial on the following grounds, which are all of the grounds presented in the Petition (Inst. Dec. 27; Paper 97, 3; *see* Pet. 25–87):

Statutory Ground <sup>1</sup>	Basis	Challenged Claims
§ 102	Ogawa <sup>2</sup>	1–6, 8, and 10

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<sup>1</sup> The relevant post-grant review provisions of the America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), took effect on March 16, 2013. 125 Stat. at 293, 311. Because the application from which the ’419 patent issued was filed after that date, our citations to Title 35 are to its post-AIA version. Section 4(c) of the AIA re-designated 35 U.S.C. §§ 112(1), (2) as 35 U.S.C. §§ 112 (a), (b), respectively, effective September 16, 2012. 125 Stat. at 296–297.

<sup>2</sup> Ogawa et al., U.S. Patent No. 7,044,986 B2, issued May 16, 2006 (Ex. 1002, “Ogawa”).

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Statutory Ground <sup>1</sup>	Basis	Challenged Claims
§ 103	Ogawa, Berkemer, <sup>3</sup> and KR '564 <sup>4</sup>	1–8 and 10
§ 103	Kitabata, <sup>5</sup> Berkemer, and KR '564	1–8 and 10

*D. The '419 Patent*

The '419 patent “generally relates to formulations and methods for treating keratin in hair, skin, or nails, and in particular for strengthening and/or repairing hair during or after a coloring or permanent wave treatment.” Ex. 1001, 1:16–19. Certain treatments of hair, including dyeing and bleaching, can result in the disulfide bonds of the hair’s keratin being broken, and the '419 patent expresses “a need for hair formulations and treatments that repair and/or strengthen keratin in hair damaged [by these treatments].” *Id.* at 1:31–2:44. The '419 patent “provide[s] improved formulations and methods for repairing and/or strengthening damaged hair.” *Id.* at 2:49–51. The formulations of the '419 patent “may be applied simultaneously with the hair coloring formulation or subsequently to the application of the hair coloring formulation.” *Id.* at 17:32–34. These formulations are described as containing “an active agent” that may be any

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<sup>3</sup> Berkemer, German Patent Application Publication No. 1,220,969, published July 14, 1966 (Ex. 1003) (certified translation provided as Ex. 1004, “Berkemer”).

<sup>4</sup> Korean Patent Application Publication No. 10-2006-0059564, published 2006 (Ex. 1006) (certified partial translation provided as Ex. 1018, “KR '564”).

<sup>5</sup> Kitabata et al., US 2002/0189034 A1, published Dec. 19, 2002 (Ex. 1005, “Kitabata”).

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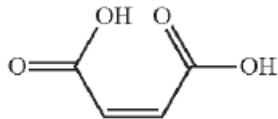
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of a large number of compounds, including maleic acid or salts thereof. *Id.* at 7:42–11:18.

*E. Illustrative Claim*

Of the challenged claims of the '419 patent, claim 1 is independent and illustrative. It recites:

1. A method for bleaching hair comprising:
  - (a) mixing a formulation comprising an active agent with a bleaching formulation, wherein the active agent has the formula:



or salts thereof;

and

- (b) applying the mixture to the hair;  
wherein the active agent in the mixture is at a concentration ranging from about 0.1% by weight to about 50% by weight;  
and

wherein the mixture does not contain a hair coloring agent.

Ex. 1001, 25:42–26:5.

ANALYSIS

*A. Claim Construction*

In a post-grant review, we construe claim terms in an unexpired patent according to their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.200(b).

Claim terms also are given their ordinary and customary meaning, as would

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