

In sum, Examiner reasons that because Becher discloses an aqueous composition comprising, *inter alia*, glyphosate and surfactants, having a

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cloud point of at least about 50° C, there would have been a reasonable expectation that a person of ordinary skill in this art would optimize Becher's composition to achieve a cloud point above at least 70° C, because "a cloud point of at least 50 degree Celsius . . . encompasses formulations with a cloud point of at least about 70 degrees Celsius" and "where the claimed ranges 'overlap or lie inside ranges disclosed by the prior art' a *prima facie* case of obviousness exists" (Ans. 11 (citing MPEP § 2144.05 and *In re Wertheim*, 541 F.2d 257 (CCPA 1976)); see FF 1; see also Ans. 5).

This is, however, the same rationale our reviewing court found unpersuasive in *Stepan*. See *Stepan*, 868 F.3d at 1345 (In *Stepan*, Examiner found that "Pallas disclose[d] highly-loaded glyphosate compositions containing surfactants having a cloud point of at least 50°C and ideally 60°C" and, although, "Pallas does not teach a cloud point about 70°C . . . achieving this cloud point would be a matter of 'optimizing the formulation' because Pallas teaches the ideal cloud point should be above 60°C."). On this record, Examiner failed to explain why it would have been routine optimization to select, from Becher's disclosure, the specific surfactants required by Appellant's claimed invention and then adjust the concentration of these surfactants to achieve a cloud point about at least 70° C as required by Appellant's claims (see Appeal Br. 4 (Appellant contends that Examiner recognizes that "Becher fails to teach the claimed ranges for Appellant[']s claimed surfactant combination and fails to teach that the formulation should have a cloud point greater than 70° C"); see FF 5; Reply Br. 2 (Appellant contends that its "claims require not only a specific combination of surfactant classes . . . but also a specific proportion of those components, particularly a high proportion of the amine oxide" resulting in a composition having a cloud point above at least 70° C or not

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cloud point when the concentrate is heated to its boiling point). Cf. *Stepan*, F.3d at 1346 ("Missing from the Board's analysis is an explanation as to why it would have been routine optimization to arrive at the claimed invention"). Stated differently, even if a person of ordinary skill in this art would select, from Becher, the specific components required to achieve Appellant's claimed surfactant system, Examiner fails to establish an evidentiary basis on this record to support a conclusion that Becher suggests optimizing the concentration of the components of this surfactant system to achieve a cloud point above 70° C. Thus, we agree with Appellant's contention that "Examiner erroneously concluded that any combination of the surfactants disclosed by Becher and used at 5% or more would yield success in making formulations having cloud points greater than 70° C because Becher's teachings as a whole do not support that position" (Appeal Br. 10; cf. Ans. 10 (Examiner concludes that because Becher discloses "herbicidal compositions comprising glyphosate which have a cloud point of at least 50 degrees Celsius," Becher teaches "one of ordinary skill . . . to make a glyphosate formulation with a cloud point of at least about 70 degrees Celsius with a reasonable expectation of success"); Ans. 11 (Examiner asserts that because Becher discloses "glyphosate compositions with a cloud point greater than 50 degrees Celsius . . . cloud points of at least about 70 degrees Celsius are encompassed by Becher"))).