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11/491,149	07/24/2006	Takeo Nakazono	1403-0331PUS1	4484
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL
BOARD

Ex parte TAKEO NAKAZONO and SHUICHI SAKAMOTO

Appeal 2011-012141
Application 11/491,149
Technology Center 1700

Before CHARLES F. WARREN, KAREN M. HASTINGS, and
JAMES C. HOUSEL, *Administrative Patent Judges*.

PER CURIAM.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1 and 3 under 35 U.S.C. § 103(a) as unpatentable over Itjima (JP 2001-026678, pub. Jan. 30, 2001) and Uchida (JP 2000-016028, pub. Jan. 18, 2000). We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

Upon consideration of the evidence on this record and each of Appellants' contentions, we find that the preponderance of evidence on this record supports the Examiner's conclusion that the subject matter of Appellants' sole independent claim 1 is unpatentable over the applied prior

art. We sustain the above rejections based on the findings of fact, conclusions of law, and rebuttals to arguments expressed by the Examiner in the Answer.

We add the following for emphasis. The burden of showing unexpected results rests on the person who asserts them by establishing that the difference between the claimed invention and the closest prior art was an unexpected difference. *See In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). Further, it is well established that the showing of unexpected results must be commensurate in scope with the claims. *See In re Peterson*, 315 F.3d 1325, 1330-331 (Fed. Cir. 2003). The Rule 1.132 Declarations of record do not compare the claimed invention to the closest prior art and do not exemplify rubber compositions that are commensurate in scope with the claims (*see, e.g.*, Ans. 5). As Appellants admit, claim 1 recites a rubber composition comprising a combination of a metallic acetate or propionate and a metallic *carbonate* (Reply Br. 2), whereas the Declarations are directed to the combination of a metallic acetate and a metallic *oxide*. Appellants have not established in the Reply Brief that indirect evidence based on different metal ions in compositions containing an oxide reliably demonstrates unexpected results for the claimed compositions which contain carbonic acid (Reply Br. 2-3). *See, e.g., In re Blondel*, 499 F.2d 1311, 1317 (CCPA 1974) (“Appellants’ brief goes through a detailed, step-by-step analysis of the evidence in support of the conclusion to be drawn from the indirect comparison,” establishing that the indirect evidence provided a reliable indication of the performance of the closest claimed and prior art compounds). Thus, the Examiner’s position that the Declarations of record

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fail to evince unexpected results from the recited combination of components is supported by a preponderance of the evidence.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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