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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,744	09/07/2011	7,902,107	B248 7004US (88418.0024.0)	4832
109171	7590	03/01/2018	EXAMINER	
WOMBLE BOND DICKINSON (US) LLP Attn: IP Docketing P.O. Box 7037 Atlanta, GA 30357-7037			LOPEZ, CARLOS N	
			ART UNIT	PAPER NUMBER
			3991	
			MAIL DATE	DELIVERY MODE
			03/01/2018	PAPER

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The time period for reply, if any, is set in the attached communication.



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,894	02/15/2012	7,902,107 B2	H0610.0506/P506-RE	7108
109171	7590	03/01/2018	EXAMINER	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JOHNSON MATTHEY, INC. & HALDOR TOPSOE A/S DENMARK,
Requesters and Appellants,

v.

Patent of BASF CORPORATION,
Patent Owner and Respondent

Appeal 2017-006009
Reexamination Control 95/001,744 & 95/001,894 (merged)
Patent 7,902,107 B2
Technology Center 3900

Before RICHARD M. LEBOVITZ, JEFFREY B. ROBERTSON, and
JEFFREY W. ABRAHAM, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON REHEARING

In a Decision on Appeal issued August 29, 2017 (“Decision”), the panel reversed the Examiner’s decision not to adopt certain proposed rejections of claims 1, 3–21, 23–34, 36, and 37 of United States Patent 7,902,107 B2 (hereinafter the “107 Patent”), which by operation of rule constituted a new ground of rejection under 37 C.F.R. § 41.77(b). In accordance with 37 C.F.R. § 41.77(b)(2), Patent Owner BASF Corporation (hereinafter “Patent Owner”) requests rehearing of the Decision under 37 C.F.R. § 41.79.¹ Request for Rehearing (“Request” or “Req. Reh’g”) dated September 29, 2017.

Third-Party Requester Johnson Matthey, Inc. (hereinafter “JMI”) submitted comments on Patent Owner’s Request for Rehearing on October 27, 2017 (hereinafter “Comments”). Third-Party Requester Haldor Topsoe A/S Denmark (hereinafter “HTAS”) did not file a response to Patent Owner’s Request.

Patent Owner contends that the Board misapprehended or overlooked the following points:

1. The Board overlooked extensive testimony of experts that the teaching of Ohno ’351² would not have led one of ordinary skill in

¹ 37 C.F.R. § 41.79(b)(1) states: “Arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs are not permitted in the request for rehearing except as permitted by paragraphs (b)(2) and (b)(3) of this section.” 37 C.F.R. § 41.79(b)(3) states: “New arguments responding to a new ground of rejection made pursuant to § 41.77(b) are permitted.”

² WO 02/26351 A1 published April 4, 2002, citations to English translation of Record.

- the art to incorporate the SCR catalyst disclosed in Speronello³ in a wall-flow monolith as disclosed in Ohno '351 (Request 2–5);
2. The Decision misapprehended or overlooked significant and consequential differences between wall-flow filters and flow-through filters, overlooking the state of the art at time of the invention (Request 5–6); and
 3. The Decision overlooks extensive testimony from those skilled in the art supporting Patent Owner's position that Ohno '351 requires an oxidation catalyst. (Request 6–7.)

As further discussed below, we are not persuaded that the Decision was deficient for the reasons argued by Patent Owner.

1. Combination of Ohno '351 with Speronello

Patent Owner contends that the Board did not identify a sufficient reason for combining Ohno '351 and Speronello and overlooked the testimony of Dr. Haller and Dr. Farrauto with respect to Patent Owner's contention that Ohno '351 teaches away from washcoat methods and discloses a different type of filtrate system from the system in Speronello and the system recited in the claims of the '107 Patent. (Request 5–6, citing

³ U.S. Patent 5,516,497 issued May 14, 1996.

Haller '744 Decl.⁴ ¶¶ 11–13, 17; Farrauto Decl.⁵ ¶ 16, ¶¶ 11–25; Patchett '744 Decl.⁶ ¶¶ 10–13.)

We are not persuaded that we misapprehended or overlooked the evidence of record in this regard. In the Decision, citing the Haller '744 Declaration ¶ 13, Farrauto Declaration ¶¶ 18–19, and Patchett '744 Declaration ¶ 14, we expressly addressed Patent Owner's contention that Ohno '351 teaches away from wash coating and that such coating would impart structural characteristics that would distinguish it from the prior art. (Decision 18–19.) Thus, while Patent Owner cites additional paragraphs in the declarations beyond those cited in the Decision, it is evident that the Decision did not overlook such evidence and the positions expressed therein.

2. Difference between wall-flow filters and flow-through monoliths

Patent Owner contends that with respect to wall-flow filters and flow-through monoliths, the Decision overlooked the state of the art at the time of the invention and did not sufficiently explain why one of ordinary skill in the art would have modified Ohno '351 and Speronello, and quotes the Dettling '744 Declaration, paragraph 24 for the proposition that the teachings of Speronello would be irrelevant to Ohno '351. (Request 5–6, citing also

⁴ Declaration of Gary L. Haller, Ph.D. Under 37 C.F.R. § 1.132 and exhibit, dated January 23, 2012.

⁵ Declaration of Robert J. Farrauto, Ph.D. Under 37 C.F.R. § 1.132 and exhibits, dated June 27, 2012.

⁶ Declaration of Joseph A. Patchett, Ph.D. Under 37 C.F.R. § 1.132, dated June 28, 2012.

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Dettling '744 Decl.⁷ ¶¶ 13–17; Haller '744 Decl. ¶ 19; Second Haller Decl.⁸ ¶ 28; Decision 19–20.)

The Decision discusses Patent Owner's contentions with respect to the difference between wall-flow filters and flow-through filters. (Decision, pp. 19–20, section titled "*Wall-Flow v. Flow-Through Filters*".) Contrary to Patent Owner's contentions, the Decision did not end the analysis by simply concluding that the different filter types disclosed in Speronello and Ohno '351 did not mean that Speronello and Ohno '351 were in different technical fields.

Rather, the Decision further explains:

Both types of filters are associated with the purification of exhaust from engines, and in particular reduction of NO_x gases therefrom. (FF 2, 4, 5, 9, 10.) Moreover, both Ohno '351 and Speronello do not limit the applications with which the filters described therein could be used. (FF 4, 5, 8.) In addition, as evidenced by Heck, zeolites were known in the art to be used for NO_x reduction with ammonia at higher temperatures. (Heck, Fig. 8.9.) Accordingly, Patent Owner's contentions with respect to the considerations involved with different types of filters are not persuasive.

(Decision 20.)

In addition, the Decision expressly references JMI's Appeal Brief and declaration evidence. (Decision 19–20; JMI App. Br. 6, 9–10; Walker

⁷ Declaration of Joseph C. Dettling Under 37 C.F.R. § 1.132 and exhibits, dated June 29, 2012.

⁸ Second Declaration of Gary L. Haller, Ph.D. Under 37 C.F.R. § 1.132 and exhibits, dated June 28, 2012.

Decl.⁹ ¶ 11; Phillips Decl. ¶ 5.) The Walker Declaration and the Phillips Declaration provide evidence that is contrary to the statements made in the Dettling '744 Declaration quoted by Patent Owner in the Request. Specifically, the Phillips Declaration¹⁰ states that one of ordinary skill in the art would have sought to optimize the amount of SCR catalyst loaded onto a relatively high porosity wall flow filter to avoid undue back pressure and would have considered the general filter coating knowledge available at the time, including washcoat loading of catalysts for soot combustion or NOx absorption. (Phillips Decl. ¶ 5.) The Walker Declaration states that one of ordinary skill in the art would have looked to SCR catalysts used on a flow through substrate in Speronello because the catalytic functional requirements are the same. (Walker Decl. ¶ 11.)

The Decision expressly references paragraph 19 of the (first) Haller '744 Declaration cited by Patent Owner in the Request. (Decision 19–20.) Thus, it is evident that the Decision considered the Haller '744 Declaration. Regarding paragraph 28 of the Second Haller Declaration specifically referenced by Patent Owner in the Request, which discusses certain deficiencies in the experiments in the Phillips Declaration relating to unexpected results, the Decision discusses unexpected results and references the Second Haller Declaration's conclusions that the results are unexpected, stating that the results were not commensurate in scope with the claims. (Decision 22, 21–25.)

⁹ Declaration of Andrew P. Walker, Ph.D., Under 37 C.F.R. § 1.132 and exhibits, dated February 24, 2012.

¹⁰ Declaration of Paul R. Phillips, Ph.D., Under 37 C.F.R. § 1.132, dated February 3, 2012.

Thus, after weighing the evidence of record, including the declaration evidence presented by Patent Owner and the declaration evidence presented by JMI, we were not persuaded by Patent Owner's contention that the difference between wall-flow filters and flow-through filters would have dissuaded one of ordinary skill in the art from combining Ohno '351 and Speronello. (*See* Decision 25.) Accordingly, we are not persuaded that we misapprehended or overlooked the evidence regarding the difference between wall-flow and flow-through monoliths.

3. Disclosure of Ohno '351

Patent Owner contends that the Decision overlooked expert testimony in concluding that Ohno '351 does not require an oxidation catalyst. (Request 6.) Patent Owner also argues that they have explained that substituting an SCR catalyst in Ohno '351 would destroy the purpose of Ohno '351. (Request 6–7, citing Dettling Decl. ¶ 24, Farrauto Decl. ¶ 14, 2nd Haller Decl. ¶ 17.)

The Decision addressed this argument and cited to evidence stating: “In this regard, we agree with JMI that Ohno '351, while providing an example of an oxidation catalyst, is not limited to oxidation catalysts, but is generally directed to ‘an exhaust gas purifying filter.’ (FF 4; JMI App. Br. 9; Second Blakeman Decl.¹¹ ¶¶ 12, 13.)” (Decision 20–21.) In doing so, the Decision considered Patent Owner's evidence, but in view of the disclosure

¹¹ Second Declaration by Phillip G. Blakeman, Ph.D., Under 37 C.F.R. § 1.132.

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of Ohno '351 and the declaration evidence provided by JMI, the Board was not persuaded by Patent Owner's narrow interpretation of Ohno '351.

Therefore, we decline to make any changes in the Decision mailed September 28, 2016. Accordingly, the Request for Rehearing is denied.

DENIED

PL: peb

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