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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANDREAS HERRMANN, GUILLAUME GODIN, AND JEAN-MARIE LEHN

Appeal 2019-000047
Application 12/523,964
Technology Center 1600


NEW, Administrative Patent Judge.

DECISION ON APPEAL

1 Appellants identify Firmenich S.A., Université de Strasbourg, and Centre National De La Recherche Scientifique as the real party-in-interest. Appeal Br. 3.
SUMMARY


We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

NATURE OF THE CLAIMED INVENTION

Appellants’ invention is directed to a method for obtaining a dynamic mixture obtained by combining, in the presence of water, at least one diamine derivative, comprising at least one benzylamine moiety, with at least one active aldehyde or ketone. Abstr.

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2 The Examiner’s prior Final Rejection of claims 19–26, 29–33, 35, 36, 38, and 39 of Appellants’ application was appealed to the Board as Appeal No. 2013–007079. The Board affirmed the Examiner’s rejection of the claims on March 11, 2016. Following the Board’s affirmation, Appellants amended the claims and resumed prosecution. Appellants now appeal to the Board from the Examiner’s Final Rejection of the amended claims, filed March 26, 2018.
REPRESENTATIVE CLAIM

Claim 19 is representative of the claims on appeal, and recites:

19. A method for releasing in a controlled and prolonged manner an active compound from a perfuming composition onto a surface, which method comprises:

preparing a consumer product that includes therein a perfuming composition that is to release a perfuming aldehyde or ketone from the consumer product, wherein the perfuming composition comprises a dynamic mixture for providing a controlled release of a perfuming effective amount of active aldehydes or ketones, wherein the dynamic mixture is obtainable by reversibly reacting, in a water-containing medium,

i) at least two active aldehydes or ketones selected from:

(A) aldehydes of formula R''-CHO wherein R'' is a linear or a-branched alkyl group of C₆ to C₁₂, benzaldehyde, 1,3-benzodioxol-5-carboxaldehyde, 3-(1,3-benzodioxol-5-yl)-2-methylpropanal, 2,4-decadinal, 2-decenal, 4-decanal, 8-decanal, 9-decanal, 3-(6,6-dimethyl- bicyclo[3.1.1]hept-2-en-2-yl)propanal, 2,4-dimethyl-3-cyclohexene-1-carbaldehyde, 3,5-dimethyl-3-cyclohexene-1-carbaldehyde, 1-(3,3-dimethyl-1-cyclohexyl)-1-ethanone, 5,9-dimethyl-4,8-decadinal, 2,6-dimethyl-5-heptenal, 3,7-dimethyl-2,6-octadienal, 3,7-dimethyloctanal, 3,7-dimethyl-6-octenal, (3,7-dimethyl-6-octenyl)acetaldehyde, 3-dodecanal, 4-dodecanal, 3-ethoxy-4-hydroxybenzaldehyde, 4-ethyl benzaldehyde, 3-(2 and 4-ethylphenyl)-2,2-dimethylpropanal, 2-furancarbaldehyde, 2,4-heptadienal, 4-heptenal, 2-hexyl-3-phenyl-2-propenal, 2-hydroxybenzaldehyde, 7-hydroxy-3,7-dimethyloctanal, 4-hydroxy-3-methoxybenzaldehyde, 4- and 3-(4-hydroxy-4-methylpentyl)-3-cyclohexene-1-carbaldehyde, 4-isopropylbenzaldehyde, 3-(4-isopropylphenyl)-2-methylpropanal, 2-(4-isopropylphenyl)propanal, 1,8-p-menthadien-7-al, (4R)-1-p-menthene-9-carbaldehyde, 2- and 4-methoxybenzaldehyde, 6-methoxy-2,6-dimethylheptanal, 8(9)-methoxy-tricyclo[5.2.1.0.(2,6)]decane-3(4)-carbaldehyde, 4-methylbenzaldehyde, 2-(4-methylenecyclohexyl)propanal, 1-methyl-
4-(4-methyl-3-pentenyl)-3-cyclohexen-1-carbaldehyde, 4-(4-methyl-3-pentenyl)-3-cyclohexene-1-carbaldehyde, (4-methylphenoxy) acetaldehyde, (4-methylphenyl) acetaldehyde, 3-methyl-5-phenylpentanal, 2-(1-methylpropyl)-1-cyclohexanone, 2,4-nonadienal, 2,6-nonadienal, 2-nonenal, 6-nonenal, 8-nonenal, 2-octenal, phenoxy acetaldehyde, phenyl acetaldehyde, 3-phenylbutanal, 3-phenylpropanal, 2-phenylpropanal, 3-phenyl-2-propenal, 3-(4-tert-butylphenyl)-2-methylpropanal, 3-(4-tert-butylphenyl) propanal, tricyclo[5.2.1.0(2,6)] decane-4-carbaldehyde, exo-tricyclo[5.2.1.0(2,6)] decane-8-carbaldehyde, 2,6,6-trimethylbicyclo[3.1.1] heptane-3-carbaldehyde, 2,4,6- and 3,5,6-trimethyl-3-cyclohexene-1-carbaldehyde, 2,2,3-trimethyl-3-cyclopentene-1-acetaldehyde, 2,6,10-trimethyl-2,6,9,11-dodecatetraenal, 2,5,6-trimethyl-4-heptanal, 3,5,5-trimethylhexanal, 2,6,10-trimethyl-9-undecenal, 2-undecenal, 10-undecenal, 9-undecenal or Intreleven aldehyde; and/or

(B) C_{6,11} ketones of formula R’-(CO)-R” wherein R’ and R” are linear alkyl groups, damascenones, damascones, ionones, methyl ionones, irones, macrocyclic ketones, cyclopentadecanone, 3-methyl-4-cyclopentadecen-1-one, 3-methyl-5-cyclopentadecen-1-one, 3-methyl-i-cyclopentadecanone, 1-(2-aminophenyl)-1-ethanone, 1-(5,5-dimethyl-1-cyclohexen-1-yl)-4-penten-1-one, 1-(3,3-dimethyl-1-cyclohexyl)-1-ethanone, 2,5-dimethyl-2-octene-6-one, 4,7-dimethyl-6-octene-3-one, (3,7-dimethyl-6-octenyloxy) acetaldehyde, 1-(2,4-dimethylphenyl)-1-ethanone, 4-(1,1-dimethylpropyl)-1-cyclohexanone, 2,4-di-tert-butyl-1-cyclohexanone, ethyl 4-oxopentanoate, 1-(4-ethylphenyl)-1-ethanone, 2-hexyl-1-cyclopentanone, 2-hydroxy-3-methyl-2-cyclopenten-1-one, 4-(4-hydroxy-1-phenyl)-2-butanone (raspberry ketone), 1-(2- and 4-hydroxyphenyl)-1-ethanone, 4-isopropyl-2-cyclohexen-1-one, 1-(4-isopropyl-1-phenyl)-1-ethanone, 1(6),8-p-mentadien-2-one, 4(8)-p-menthen-3-one, 1-(1-p-menthen-2-yl)-1-propanone, menthone, (1R,4R)-8-mercapto-3-p-menthanone, 1-(4-methoxyphenyl)-1-ethanone, 7-methyl-2H,4H-1,5-benzodioxepin-3-one, 5-methyl-3-heptanone, 6-methyl-5-hepten-2-one, methyl 3-oxo-2-pentyl-1-cyclopentaneacetate, 1-(4-methylphenyl)-1-ethanone (4-methylacetophenone), 5-methyl-exo-tricyclo[6.2.1.0(2,7)] undecan-4-one, 3-methyl-4-(1,2,2-trimethylpropyl)-4-penten-2-one, 2-
naphthalenyl-1-ethanone, 1-(octahydro-2,3,8,8-tetramethyl-2-naphthalenyl)-1-ethanone, 3,4,5,6,6-pentamethyl-3-hepten-2-one, 2-pentyl-1-cyclopentanone, 4-phenyl-2-butanone, 1-phenyl-1-ethanone, 2- and 4-tert-butyl-1-cyclohexanone, 1-(4-tert-butylphenyl)-1-ethanone), 2,4,4,7-tetramethyl-6-octen-3-one, 1,7,7-trimethyl-bicyclo[2.2.1]heptan-2-one, 2,6,6-trimethyl-1-cycloheptanone, 2,6,6-trimethyl-2-cyclohexene-1,4-dione, 4-(2,6,6-trimethyl-2-cyclohexen-1-yl)-2-butanone (dihydroionone), 1-(2,4,4-trimethyl-2-cyclohexen-1-yl)-2-buten-1-one, 1-(3,5,6-trimethyl-3-cyclohexen-1-yl)-1-ethanone, or 2,2,5-trimethyl-5-pentyl-1-cyclopentanone; with

ii) at least one derivative of formula

\[
\text{Formula (I)}
\]

wherein:

- \( n \) represents an integer varying from 0 to 3;

- \( R^1 \) represents, independently of each other, a hydrogen atom, a phenyl group optionally substituted, or a C1-6 alkyl or alkenyl group optionally substituted;

- \( R^2 \) represents, independently of each other a hydrogen atom, a phenyl group optionally substituted, or a C1-6 alkyl or alkenyl group optionally substituted; two \( R^2 \) or two \( R^1 \) or one \( R^1 \) and one \( R^2 \), taken together, may form a C3-5 alkanediyl or alkenediyl group; and \( R^3 \) and \( R^4 \) represent each a C1-3 alkyl group substituted by a phenyl group optionally substituted; \( R^3 \) and \( R^4 \) or \( R^3 \) and the adjacent \( R^1 \), taken together, may form a C2-4 alkanediyl or alkenediyl group; wherein the at least two active aldehydes or ketones and the at least one derivative of formula (I) are initially maintained in equilibrium by the reversible reaction to thereby stabilize the mixture in order to retard the release of the active aldehydes or ketones during storage and prior to use, and said water-containing medium comprises at least 50% w/w of water and optionally up to 30% of a surfactant;
maintaining consumer product parameters constant during storage of the consumer product in order to maintain stability of the dynamic equilibrium of the perfuming composition and avoid release of the aldehydes or ketones; and

releasing the aldehydes or ketones in a controlled and prolonged manner by applying the consumer product containing the perfuming composition to or upon a surface to disturb the equilibrium and impart a fragrance and a freshness to the treated surface;

wherein free active aldehydes or ketones are released into the equilibrated dynamic mixture in an amount of between 5 and 95%,

wherein a total molar amount of the active aldehydes or ketones and a total molar amount of the derivative of formula (I) are present at a ratio of between 1:2 and 50:1,

wherein the fragrance imparted to the treated surface that remains beyond subsequent water rinsing and air drying steps that are applied to the treated surface.


ISSUES AND ANALYSES

We are persuaded by, and adopt, the Examiner’s findings, reasoning and conclusion that Appellants’ claims are prima facie obvious over the combined prior art. We address the arguments raised by Appellants below.

As an initial matter, we note that Appellants repeat the arguments presented in their prior appeal, that: (1) Bryant does not disclose the formation of aminals; (2) Jurčík does not teach a reversible dynamic equilibrium, since it teaches that the equilibrium in water favors formation of aminals and is unfavorable for the release of free aldehydes or ketones;
(3) Behan’s formulations contain an irreversible release of pro-fragrance acetals or ketals and not a dynamic mixture. ³ Appeal Br. 10, 12–13.

These arguments were previously considered by the Board in our prior Decision and were not persuasive. See Decision 6–8, 11–12. Although the claims have been amended since the prior decision, these arguments by Appellants address limitations of the claims that are not substantively altered from those of the prior appeal. As such, we are not persuaded by Appellants’ arguments in these respects for the same reasons stated in our prior Decision. Id.

Issue 1

Appellants argue the Examiner erred because Bryant does not teach or suggest the specifically-named multiple aldehyde or ketone compounds, or the aldehyde/ketone concentration ranges and molar ratios, recited in the claims. App. Br. 10–11.

Analysis

The Examiner finds that Bryant teaches methods of modifying the release of fragrances from consumer products by providing the fragrance compounds in the form of “pro-fragrance” ketals or acetals. Final Act. 4 (citing Bryant col. 1, ll. 9–27). The Examiner finds Bryant teaches multiple

³ Appellants also provide, in their Appeal Brief, arguments concerning the Board’s reasoning in its prior Decision. Appeal Br. 17. However, Appellants did not file Request for Rehearing of the Board’s Decision, or timely appeal to our reviewing court. We consequently arrive at the same conclusions, and for the same reasons, for these arguments that we explained in our prior Decision.
pro-fragrance compounds and that the compounds are stable under pH conditions encountered in the formulation and storage of detergent products. *Id.* (citing Bryant col. 9, ll. 46–57, and col. 9, l. 63–col. 10 l. 21). The Examiner also finds that Bryant teaches the pro-fragrances are hydrolyzed to release the parent fragrant aldehydes or ketones when pH is reduced by even the presence of as little water as is available as atmospheric humidity. *Id.* at 4, 6 (citing Bryant col. 8, ll. 30–44 and Col. 9, ll. 45–57). The Examiner finds that Bryant teaches that “the laundry process includes rinsing and sometimes drying,” and that the pro-fragrance compositions suitably provide “a long-term fragrance to the laundered textile fabrics,” which “enhance deposition on fabric surfaces in the wash solution, and enhanced retention on the washed surface during rinsing.” *Id.* at 6 (citing Bryant col. 2, ll. 16–17, 30–35 and col. 11, ll. 17–30).

The Examiner finds that Bryant also teaches incorporating fully formulated fragrances into the composition to provide in-package and in use fragrance. *Id.* at 4–5 (citing Bryant col. 11, ll. 18–28 and col. 12 l. 1–col. 14, l. 6). The Examiner concludes that it would have been *prima facie* obvious to select the parent aldehyde or ketone as the additional fragrance to accompany the pro-fragrance acetal or ketal and that the concentration and molar ratios recited by the instant claims can be optimized by routine experimentation. *Id.* at 6–7.

The Examiner finds that although Bryant does not show the formation of aminals resulting from a perfuming ketone or aldehyde and a diamine, Jurčík shows that aminals are the aminated chemical equivalents of acetals and ketals. Final. Act. 7 (citing Jurčík 3205). The Examiner finds that Jurčík indicates that aminals can be advantageously formed in water and that
the reference clearly conveys that aminals and aldehydes exist in a reversible
dynamic equilibrium. Id. at 7–8 (citing Scheme 1 of Jurčík). The Examiner
concludes that it would have been *prima facie* obvious to have substituted
the aminals of Jurčík for the multiple pro-fragrance ketals or acetals of the
Bryant perfumed compositions, which optionally contain additional fragrant
compounds. Id. at 8–9. The Examiner determines that this combination
would provide both immediate and extended release of fragrance following
rinsing or drying in the methods of laundering textiles, owing to the
interaction with atmospheric water disturbing the equilibrium achieved by
aminals and the parent aldehyde and ketone mixtures. *Id.*

Appellants argue that Bryant fails to disclose the aldehyde/ketone
concentration ranges and molar ratios of free-aldehyde/ketone to aminal
recited in the claims on appeal, in which: “free active aldehydes or ketone
are released into the equilibrated dynamic mixture in an amount of between
5 and 95%” and “a total molar amount of the active aldehydes or ketones
and a total molar amount of the derivative of formula (I) are present at a
ratio of between 1:2 and 50:1”. Appeal Br. 10–11.

Appellants contend that Bryant does not mention any of the
specifically claimed aldehyde or ketone compounds, and does not mention
that at least two of such compounds must be included in the presently
claimed dynamic mixture. Id. at 11. According to Appellants, the claims
clearly define the chemical structure and ratios of the constituents of the
dynamic mixture and that the molar ratio can influence the specific physical
or thermodynamic properties of the dynamic mixture and provide
unexpected effects of the present invention to release active compounds in a
controlled and prolonged manner. *Id.* at 11.
We are not persuaded. Bryant explicitly teaches “the pro-fragrance compound can be used as the sole fragrance compound of the present detergent compositions, or in combination with other pro-fragrances and/or in combination with other fragrance materials.” Bryant col. 9, ll. 63–65. Bryant teaches incorporating pro-fragrances formed from a number of the ketones and aldehydes recited in the present claims, such as vanillin, a fragrant C\textsubscript{8} aldehyde, triplal (a C\textsubscript{9} aldehyde, also a 2,4-dimethyl cyclohex-3-ene-1-carbaldehyde), citral (a C\textsubscript{10} aldehyde), citronella! (a C\textsubscript{10} aldehyde), and others. See Final Act 5 (citing Bryant col. 1, ll. 64–66, and col. 4, l. 58–c. 5, l. 4). We agree with the Examiner that it would be obvious to select the corresponding parent aldehydes or ketones as the additional fragrance materials to accompany the pro-fragrance acetals or ketals described in Bryant, simply owing to the continuity of in-package and in-use fragrance that such a combination would provide. Id. at 6.

With respect to the claimed amount of free fragrant aldehyde or ketone and the molar ratio of free aldehyde/ketone to pro-fragrance aminal, “discovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art.” In re Boesch, 617 F.2d 272, 276 (CCPA 1980). Furthermore, “where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” In re Aller, 220 F.2d 454, 456 (CCPA 1955).

Bryant specifically teaches that the pro-fragrance compounds, on interaction with water from any source, including air and humidity, trigger the hydrolysis of the acetal or ketal moieties by which the fragrance \textit{aldehydes and ketones are released}. Final Act 6 (citing Bryant col. 8, ll. 30–
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44, and col. 9, ll. 45–57). Bryant also expressly teaches the suitability of providing desirable in-package and in-use fragrance, whereas the pro-fragrance provides for long-term fragrance owing to the known capacity for acetals/ketals and their acknowledged chemically equivalent aminals, to undergo hydrolysis to release the parent aldehydes/ketones. *Id.* at 4 (citing Bryant col. 11, ll. 18–28). Bryant provides examples of pro-fragrance/perfume compositions containing 1% of the pro-fragrance along with 0.2–0.3% of a perfume. *Id.* at 4–5 (citing Bryant, col. 12, l. 1–col. 14, l. 6). Bryant also teaches an example in which 1.0 g of a pro-fragrance is mixed into a detergent composition, and about 1.5 g of a perfumed composition is sprayed onto the mixture of detergent and pro-fragrance, to “complete the fragrance, pro-fragrance laundry detergent composition.” Bryant col. 13, ll. 48–53. This would have provided a person of ordinary skill in the art with a starting point for optimizing the amounts and molar ratios of free active aldehyde/ketone perfumes to pro-fragrances in the detergent composition. *Id.* Therefore, these limitations amount to little more than the incorporation of additional free fragrant aldehydes or ketones in combination with the pro-fragrance compounds in a manner explicitly advocated by Bryant. Ans. 17.

Nor are we persuaded by Appellants arguments with respect to the specific physical and thermodynamic properties resulting from the claimed molar ratios. Appeal Br. 11. Appellants cite no evidence in support of this argument, and as such this constitutes attorney argument to which we accord little probative weight. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (Arguments and conclusions unsupported by factual evidence carry no evidentiary weight). Appellants have not demonstrated any criticality to the
claimed ranges. We consequently uphold the Examiner’s findings with respect to this issue.

**Issue 2**

Appellants argue that the Examiner erred in concluding that the claims are obvious over the combined cited prior art, because the claimed method provides unexpected results. App. Br. 14–15.

**Analysis**

Appellants contend that the dynamic mixture of the present invention performs unexpectedly better with regard to release of fragrance than the pro-fragrance compositions of Bryant. Appellants rely on two Declarations under 37 CFR §1.132 by Dr. Andreas Herrmann, filed November 17, 2016 and June 15, 2017 (the “First Herrmann Declaration” and “Second Herrmann Declaration,” respectively) as providing evidence of the asserted unexpected results.

We do not find these Declarations persuasive of unexpected results. “[W]hen unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art.” *In re Baxter Travenol Labs*, 952 F.2d 388, 392 (Fed. Cir. 1991). The First Herrmann Declaration compares the claimed dynamic mixture with a dynamic mixture using tripropylene glycol instead of a diamine. First Herman Decl. ¶¶5–7. Neither of these compositions correspond to the pro-fragrances taught by Bryant and, therefore, the comparison described in the First Declaration is not a direct comparison with the closest prior art (i.e., Bryant), but is rather a comparison with a composition wholly unrelated to...
the acetals or ketals of Bryant. See Ans. 12. Because the results provided in the First Herrmann Declaration do not demonstrate unexpected results compared to the closet prior art, it is not persuasive here in overcoming the Examiner’s conclusion of prima facie of obviousness.

The Second Hermann Declaration describes synthesis of a pro-fragrance compound of Bryant, and tests it against the aminal pro-fragrances of the instant application by measuring the degree of fragrance liberation after application to a cotton towel. Second Hermann Decl. App’x A, Examples 3, 4. The results obtained show higher perfume headspace concentrations over time with the diamine mixture of the present invention, compared to the corresponding pro-fragrance of Bryant. Id.

We are not persuaded that these results are probative of unexpected results. We agree with the Examiner that Appellants’ data serve only to establish the fact that aminals and acetals hydrolyze at different rates. We agree with the Examiner that this knowledge would have been within the expectation of a skilled artisan. Ans. 15. In support of this finding, the Examiner points to T. Fife et al., General Acid catalysis of Imidazoldine Ring Opening: The Hydrolysis of Ethyl N,N’-[1-(p-( dimethylamino )phenyl) propenediyl]-p-[(2 tetrahydroquinolinyl)methylene ]amino]benzoate, 103 J. AM. CHEM. Soc. 1201–1207 (1981) (“Fife I”) and T. Fife, General Acid Catalysis of Acetal, Ketal, and Ortho Ester Hydrolysis, 5 ACC. CHEM. RES. 264–272 (1972) (“Fife II”).

“[I]t is not enough to show that results are obtained which differ from those obtained in the prior art: that difference must be shown to be an unexpected difference.” In re Klosak, 455 F.2d 1077, 1080 (CCPA 1972). “To be particularly probative, evidence of unexpected results must establish
that there is a difference between the results obtained and those of the closest prior art, and that the difference would not have been expected by one of ordinary skill in the art at the time of the invention.” *Bristol-Myers Squibb Co. v. Teva Pharms. USA, Inc.*, 752 F.3d 967, 977 (Fed. Cir. 2014).

Appellants have not adduced any evidence or reasoning with respect to why the Examiner’s findings concerning the expectation of the skilled artisan based on Fife I and Fife II might be incorrect.

We consequently conclude that the Examiner has established a *prima facie* case of obviousness over the combined cited prior art, and we affirm the Examiner’s rejection of the claims.

**Issue 3**

Appellants argues that Claim 40 is separately patentable, since none of the cited references teach or suggest a method that imparts a fragrance and a freshness to a treated surface that is sufficient to “remain despite subsequent rinsing and/or drying processes.” App. Br. 16–17.

**Analysis**

Claim 40 is directed to the maintenance, during storage, of a consumer product parameter that includes one or more of concentration, temperature, pH, humidity, or surfactant, that the surface is a textile, hard surface, hair or skin, and that aldehydes or ketones are released from the disturbed equilibrium and impart a fragrance and a freshness to the treated surface, that is sufficient to remain despite subsequent rinsing and/or drying processes. The Examiner finds that Bryant teaches maintaining the stability of the compounds under conditions of storage by maintaining at least pH and
humidity of the product so packaged. Ans. 19 (citing Bryant col. 9, ll. 46–57). Bryant also teaches that the pro-fragrance compounds can enhance deposition on fabric surfaces with enhanced retention during rinsing, and that the pro-fragrance provides a long-term fragrance to laundered textile fabrics. Bryant, col. 2, ll. 31–33 and col. 11, ll. 26–27. Consequently, we conclude that the limitations of claim 40 are taught by Bryant, and we affirm the Examiner’s rejection upon this ground.

DECISION

The Examiner’s rejection of claims 19–26, 29–33, 35–36, and 38–42 under 35 U.S.C. § 103(a) 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)(1)(iv). See 37 C.F.R. § 41.50(f).

AFFIRMED