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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JONATHAN ROBERT CETTI, ZERLINA GUZDAR DUBOIS,
VIRGINIA TZUNG-HWEI HUTCHINS, and
MICHAEL WAYNE KINSEY

Appeal 2019-006706
Application 14/105,489
Technology Center 1600

Before JEFFREY N. FREDMAN, DEBORAH KATZ, and JOHN G. NEW,
Administrative Patent Judges.

KATZ, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant¹ seeks our review,² under 35 U.S.C. § 134(a), of the Examiner's decision to reject claims 1, 2, 4, 6, 9, and 17 (Appeal Br. 3.) We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

¹ We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the Real Party in Interest as The Proctor & Gamble Company. (*See* Appeal Br. 1.)

² We consider the Specification dated July 28, 2015 ("Spec."), the Final Office Action issued November 26, 2018 ("Final Act."), the Appeal Brief filed April 25, 2019 ("Appeal Br."), and the Examiner's Answer issued July 10, 2019 ("Ans.").

Appellant's Specification teaches that people use perfume raw materials provide for desirable scents and masking of undesirable odors, but that users can become habituated, that is, develop a decreased sensitivity to the scents. (*See Spec.* 1:9–13 and 3:17–18.) Appellant reports the development of personal care compositions that resist habituation and the need for increasingly more product. (*Spec.* 1:4–6.) Appellant explains that some compounds, including thiols, sulfides, oxathianes, isothiocyanates, and other compounds comprising sulfur, are not subject to habituation. (*See id.* at 4:33–5:2.)

Appellant's claim 1 is directed to antiperspirant or deodorant compositions comprising perfume that includes a concentration of recited chemical alternatives within a range of concentrations. Claim 1 recites:

An antiperspirant or deodorant composition comprising an anti-habituating perfume, the perfume comprising, based on total composition weight, from about 0.000001 to about 0.00125 %, of a perfume raw material comprising a sulfur moiety selected from the group consisting of **1-butylsulfanylbutane**; ethyl 3-methylsulfanylpropanoate; 2-(methylsulfanylmethyl)furan; methylsulfanylmethane; methylsulfanylethane; 3-methylsulfanylprop-1-ene; S-methyl ethanethioate; ethylsulfanylethane; 1-methylsulfanylpropane; S-ethyl ethanethioate; 1-methylsulfanylbutane; 2-propan-2-ylsulfanyl propane; bis(methylsulfanyl)methane; 1-ethylsulfanylpropane; thiolane; 1-propylsulfanylpropane; 1-ethylsulfanylbutane; S-ethylpropanethioate; S-methyl butanethioate; S-methyl 3-methylbutanethioate; 3-methylsulfanylpropanal; 3-prop-2-enylsulfanylprop-1-ene; methyl 2-methylsulfanylacetate; S-prop-2-enylpropanethioate; 1-methylsulfanylbutan-2-one; 4-methylsulfanylbutan-2-one; 3-methylsulfanylpropan-1-amine; 2,4,6-trimethyl-1,3,5-trithiane;

3-methylsulfanylbutanal; 2-methyl-1,3-thiazolidine; 2-methyl-4,5-dihydro-1,3-thiazole; ethyl 2-methylsulfanylacetate; methyl 3-methylsulfanylpropanoate; S-propan-2-yl 3-methylbutanethioate; 4-methyl-4-methylsulfanylpentan-2-one; 2-methyl-1,3-dithiolane; methyl 2-methylsulfanylbutanoate; S-methyl furan-2-carbothioate; S-propan-2-yl 3-methylbut-2-enethioate; thiolan-3-one; 3,5-diethyl-1,2,4-trithiolane; methylsulfanylmethylbenzene; 3-methylsulfanylpropan-1-ol; 2-(propan-2-ylsulfanylmethyl)furan; 2-methyl-5-methylsulfanylfuran; S-(furan-2-ylmethyl)methanethioate; 1,2,4-trithiolane; 2-methylthiolan-3-one; 4-methylsulfanylbutan-1-ol; S-butan-2-yl 3-methylbutanethioate; S-butan-2-yl 3-methylbut-2-enethioate; S-(furan-2-ylmethyl)ethanethioate; 2-propyl-1,3-thiazolidine; 3-methyl-1,1-bis(methylsulfanyl)butane; 3-ethylsulfanylpropan-1-ol; S-methylbenzenecarbothioate; 3,5-dimethyl-1,2,4-trithiolane; S-butan-2-yl 2-methylbutanethioate; methylsulfanylbenzene; 1-pentylsulfanylpentane; (2R,4S)-2-methyl-4-propyl-1,3-oxathiane; 2-methyl-4-propyl-1,3-oxathiane; ethyl 2-methyl-2-methylsulfanylpropanoate; S-(furan-2-ylmethyl)propanethioate; 4,7,7-trimethyl-6-thiabicyclo[3.2.1]octane; 3-methyl-1,2,4-trithiane; methylsulfanylmethyl hexanoate; 1-(4,5-dihydro-1,3-thiazol-2-yl)ethanone; 3-methylsulfanylpropanoic acid; 5-methylsulfanyl-2-(methylsulfanylmethyl)pent-2-enal; 4,5-dimethyl-2-(2-methylpropyl)-2,5-dihydro-1,3-thiazole; 3-methylsulfanylhexan-1-ol; 2-methyl-4,5-dihydrofuran-3-thiol acetate; 4-(3-oxobutylsulfanyl)butan-2-one; 3-methylsulfanylbutanoic acid; 2-methylsulfanylpyrazine; 2-methyl-3-methylsulfanylpyrazine; 2-(furan-2-ylmethylsulfanylmethyl)furan; 2-(methylsulfanylmethyl)pyrazine; 3,5-di(propan-2-yl)-1,2,4-trithiolane; 2-methylsulfanylphenol; 2-methyl-3-methylsulfanylpyrazine; ethyl 3-(furan-2-ylmethylsulfanyl)propanoate; 2,2,4,4,6,6-hexamethyl-1,3,5-trithiane; 2-methyl-5,7-dihydrothieno[3,4-d]pyrimidine;

2-amino-4-methylsulfanylbutanoic acid; (2S)-2-amino-4-methylsulfanylbutanoic acid; 2',3a-dimethylspiro[6,6a-dihydro-5H-[1,3]dithiolo[4,5-b]furan-2,3'-oxolane]; 2,5-dimethyl-1,4-dithiane-2,5-diol; Methyl 2-thiofuroate; and a mixtures thereof; wherein the perfume raw material is below the odor detection threshold in the antiperspirant or deodorant composition.

(Appeal Br. 5–6, emphasis added.)

The Examiner rejects the claims under 35 U.S.C. § 103 as obvious over the combination of Mookherjee,³ Ishihara,⁴ and Dykstra.⁵ (Final Act. 3–7.) The Examiner cites Mookerjee for its teaching of perfume compositions comprising dibutyl sulfide, *i.e.*, 1-butylsulfanylbutane, Ishihara for its teaching of fragrance compositions comprising concentrations of sulfur-containing compounds that overlap with the range recited in claim 1, and Dyskstra for its teaching of perfume delivery systems. (*See* Final Act. 3–5.)

Appellant argues that the Examiner erred because the claims require “the raw material perfume is below the odor detection threshold in the antiperspirant or deodorant composition,” but that Mookherjee teaches 1-butylsulfanylbutane contributes to the composition’s odor. (*See* Appeal Br. 4.) Similarly, Appellant argues that Ishihara teaches using its compositions, including sulfur materials, to provide an odor. (*See id.*) Appellant contends

³ Mookherjee et al., U.S. Patent 3,928,248, issued December 23, 1975.

⁴ Ishihara et al., U.S. Patent Publication 2005/0245407 A1, published November 3, 2005.

⁵ Dykstra, U.S. Patent Publication 2007/0275866 A1, published November 29, 2007.

that the amount of sulfur moiety recited in claim 1 is below the odor detection threshold, allowing the consumer to avoid habituation to the other perfumes in the antiperspirant. (*See id.*)

We are not persuaded by Appellant's arguments because Ishihara teaches concentrations of 1-butylsulfanylbutane in a range that overlaps the range recited in Appellant's claim 1. Specifically, Ishihara teaches dibutyl sulfide from 0.00001 to 1 wt%, which overlaps the claimed range of about 0.000001 to about 0.00125 wt%. (*See* Ishihara ¶¶ 63, 64, claims 1–2; *see* Final Act. 4.) “A *prima facie* case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art.” *In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003). Appellant fails to direct us to evidence showing a difference between the prior art compositions and the claimed compositions or evidence that the prior art amount of sulfur-containing compounds is above the odor detection threshold. After a *prima facie* case is made out, the burden shifts to Appellant to show a difference between the prior art compounds and the claimed compound. *See In re Best*, 562 F.2d 1252, 1254–1255 (CCPA 1977).

Appellant argues further that Ishihara teaches fragrance compositions for hair compositions, not for antiperspirant and deodorant compositions as claimed. (Appeal Br. 4) Similarly, Appellant asserts that Dykstra does not teach a sulfur-related perfume material. (*See id.*)

We are not persuaded by Appellant's arguments. “Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.” *In re*

Merck & Co., 800 F.2d 1091, 1097 (Fed. Cir. 1986). Contrary to Appellant’s argument, the combined prior art teaches an antiperspirant or deodorant composition because Dykstra teaches a perfume delivery system (*see* Dykstra abstract), Mookherjee teaches using 1-butylsulfanylbutane, to provide a perfume characterized by an orris aroma (*see* Mookherjee abstract, 14:42–15:12 (Examples V and VI)), and Ishihara teaches using 1-butylsulfanylbutane in concentrations ranging from 0.00001 to 1 wt% to mask smells (*see* Ishihara ¶¶ 63, 64, claims 1–2).

Appellant argues further that the Examiner has not shown why it would be obvious to combine Ishihara with Mookherjee. (Appeal Br. 4.) Appellant’s argument is unpersuasive because, as the Examiner explains, Mookherjee teaches perfume compositions that can be used to mask a smell (*see* Mookherjee abstract) and Ishihara teaches that the amount of sulfur compound in the fragrance is sufficient to mask an acid smell and ensure balance with other materials (*see* Ishihara ¶ 65). (*See* Final Act. 5.) “[T]he law does not require that the references be combined for the reasons contemplated by the inventor.” *In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992).

Similarly, Appellant’s argument that Dykstra is unrelated to perfumes (*see* Appeal Br. 4), is unpersuasive because Dykstra teaches a perfume delivery system that allows for perfume bloom of antiperspirant or deodorant products in their neat or water-diluted form. (*See* Dykstra abstract, ¶ 59.) (*See* Final Act. 4.) Because the Examiner articulated reasoning with rational underpinning to combine the references, and has

identified a reasonable expectation of success in the combination, we sustain the Examiner's rejection of claim 1.

Appellant does not separately argue dependent claims 2, 4, 6, 9, and 17. (Appeal Br. 3–4.) Accordingly, we sustain the Examiner's rejection of claims 1, 2, 4, 6, 9, and 17 as obvious over the combined prior art.

CONCLUSION

Upon consideration of the record and for the reasons given, we affirm the Examiner's rejection.

In summary:

| Claims Rejected | 35 U.S.C. § | Reference(s)/Basis | Affirmed | Reversed |
|------------------------|--------------------|-------------------------------|-------------------|-----------------|
| 1, 2, 4, 6, 9, 17 | 103 | Mookherjee, Ishihara, Dykstra | 1, 2, 4, 6, 9, 17 | |

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

AFFIRMED