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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/250,425	10/17/2005	Edward C. Coleman	9610-77326-US	5168
109813	7590	01/31/2013	EXAMINER	
Fitch, Even, Tabin & Flannery, LLP			BEKKER, KELLY JO	
Mondelez International, Inc.			ART UNIT	
120 South LaSalle Street			PAPER NUMBER	
Suite 1600			1791	
Chicago, IL 60603-3406			MAIL DATE	
			DELIVERY MODE	
			01/31/2013	
			PAPER	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte EDWARD C. COLEMAN, ABIGAIL SCHMID
and MICHAEL MIKLUS

Appeal 2011-010206
Application 11/250,425
Technology Center 1700

Before RICHARD E. SCHAFER, JEFFREY T. SMITH, and
JAMES C. HOUSEL, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1 through 6, 8 through 25 and 27 through 30. We have jurisdiction under 35 U.S.C. § 6.

Appellants' claimed invention relates to a food bar. App. Br. 4.
Claim 1 is illustrative:

1. A food bar having less than 110 Cal/28g serving, comprising:

a core layer comprising, as a unitary matrix, protein crisps, caramel, water-soluble dietary fibers, binder material, and a compound coating;

a caramel layer separate from the core layer and comprising water-soluble dietary fibers;

the compound coating separately applied to surface portions of the core layer and the separate caramel layer; and

wherein the compound coating comprises water-soluble dietary fibers.

The Examiner relied on the following references in rejecting the appealed subject matter:

Becker	US 4,673,578	June 16, 1987
Dubberke	US 6,399,133 B2	June 4, 2002
Mody	US 2002/0168448 A1	Nov. 14, 2002
Manning	US 2002/0192265 A1	Dec. 19, 2002
Scott De Martinville	US 2003/0008039 A1	Jan. 9, 2003
Rapp	US 6,562,392 B1	May 13, 2003
Froseth	US 6,592,915 B1	July 15, 2003
Engleson	US 2005/0208180 A1	Sept. 22, 2005

Gloria Tsang, *Fiber 101: Soluble Fiber vs Insoluble Fiber*, October 10, 2004 (date obtained from <http://web.archive.org>), <http://www.healthcastle.com>.

Appellants request review of the following rejection (App. Br. 9) from the Examiner's final office action:

1. Claims 1-6, 8-25, and 27-30 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Manning, Froseth, Mody, Rapp, Dubberke and Tsang.

OPINION

The dispositive issue for this appeal is: Did the Examiner err in determining that the combination of Manning, Froseth, Mody, Rapp, Dubberke and Tsang would have led one skilled in the art to a food bar having water-soluble dietary fiber distributed across the components of the food bar as required by the subject matter of independent claims 1, 24, 25 and 27?¹

¹ We will limit our discussion to independent claim 1.

After thorough review of the respective positions provided by Appellants and the Examiner, we REVERSE for the reasons presented by the Appellants and add the following.

During examination, the Examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

The Examiner found that Manning discloses a basic food bar comprising a core layer having water-soluble dietary fibers, a caramel top layer and a compound coating. Ans. 4-6. The Examiner also found that Manning does not disclose the protein crisps, the caramel component in the core layer, the caramel layer as having water-soluble dietary fibers and the compound coating comprising water-soluble dietary fibers as required by the subject matter of independent claim 1. *Id.* at 6-7. To reach the subject matter of independent claim 1, the Examiner relied on the teachings of Froseth, Mody and Rapp.² *Id.* at 7-8. The Examiner concluded that it would have been obvious to one skilled in the art to distribute the water-soluble dietary fibers across multiple components of a food bar to minimize the off taste caused by the fibers. *Id.* at 12-14.

² We note that the Examiner did not rely on the references to Dubberke and Tsang to reach the subject matter of independent claim 1. A discussion of these references is unnecessary for disposition of the present appeal. The Examiner relied upon these references for features of other claims not related to the dispositive issue.

Appellants argue, and we agree, that the Examiner has not adequately explained why one skilled in the art would modify the food bar of Manning to incorporate water-soluble dietary fibers in each of the components of the food bar. App. Br. 12-14. The Examiner has not adequately explained why the redistribution of water-soluble dietary fibers would lead to any organoleptic property that would offset the fibers' off taste because, as argued by Appellants, the off flavors would still exist whether or not the fibers are in one layer or in multiple layers. *Id.* at 13. Thus, the Examiner's proposed modification does not solve the problem of the fibers' off taste.

Here, the Examiner's proposed modification appears premised on using Appellants' claimed invention as a road map rather than an articulated reasoning based on teachings derived from the applied references' disclosures. The fact finder must be aware "of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. at 421 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966) (warning against a "temptation to read into the prior art the teachings of the invention in issue")); *see In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) (citing *In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984) ("The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.")).

Under these circumstances, we cannot conclude that the Examiner has met the minimum threshold of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Accordingly, we reverse the prior art rejection of claims 1-6, 8-25, and 27-30.

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ORDER

The rejection of claims 1-6, 8-25, and 27-30 under 35 U.S.C. § 103(a) as unpatentable over Manning, Froseth, Mody, Rapp, Dubberke and Tsang is reversed.

REVERSED

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