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BRIGGS AND MORGAN P.A. 2200 IDS CENTER 80 SOUTH 8TH ST MINNEAPOLIS, MN 55402			BEKKER, KELLY JO	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* WILLIAM E. BURDICK

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Appeal 2011-012146  
Application 11/800,752  
Technology Center 1700

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Before RICHARD TORCZON, ROMULO H. DELMENDO, and  
GRACE KARAFFA OBERMANN, *Administrative Patent Judges*.

DELMENDO, *Administrative Patent Judge*

DECISION ON APPEAL

William E. Burdick, the Appellant,<sup>1</sup> seeks our review under 35 U.S.C. § 134(a) of a final rejection of claims 42-49 and 51. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The invention relates to the commercial multi-barrel production of

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<sup>1</sup> The Appellant identifies the real party in interest as “Granite City Food and Brewery Ltd.” Appeal Brief filed February 28, 2011 (“App. Br.”) at 1.

beer. Specification (“Spec.”) 1, ll. 11-14. Representative claim 42 is reproduced below:

42. A method for distributed production of commercial volumes of beer, comprising:

(a) producing 8 to 13 barrels of hopped wort in a brew kettle;

(b) chilling the hopped wort without concentration of the hopped wort and transferring it into an insulated, aerobic, and unpressurized transportation vessel on a vehicle wherein the hopped wort is chilled to a temperature of approximately 29°F to 40°F;

(c) transporting the unconcentrated, chilled hopped wort to any of a plurality of brewing pubs;

(d) transferring the unconcentrated hopped wort into a fermentation vessel at a brew pub;

(e) elevating the hopped wort to an appropriate fermentation temperature; and

(f) adding a predetermined amount of yeast cells to the hopped wort in the fermentation vessel to produce beer.

App. Br., Claims App’x. 1.

The Examiner rejected claims 42-49 and 51 under 35 U.S.C. § 103(a) as unpatentable over Kinsman<sup>2</sup> in view of the combination of Bayne<sup>3</sup> and the Appellant’s discussion of the prior art in the Specification. Ans. 3-11.

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<sup>2</sup> Kinsman is said to be from “Homebrew Digest #2532 page 19, 10-1997.” Examiner’s Answer mailed May 9, 2011 (“Ans.”) at 3.

<sup>3</sup> U.S. Patent 3,290,153 issued December 6, 1966.

## DISCUSSION

The dispositive issue in this appeal is whether the Appellant demonstrated prejudicial error in the Examiner's conclusion that a person of ordinary skill in the art would have been prompted to produce "8 to 13 barrels of hopped wort in a brew kettle," as recited in claim 42, in view of the applied prior art.

The Appellant does not dispute the Examiner's findings at pages 3-4 of the Answer regarding the scope and content of Kinsman. App. Br. 9-17. Rather, the Appellant contends that the production of "8 to 13 barrels of [unconcentrated] hopped wort" would not have been obvious to a person of ordinary skill in the art in view of the applied prior art, including Kinsman's disclosure of producing 1.5 to 2 barrels of unconcentrated hopped wort. *Id.* at 8, 15. The Appellant argues that because Bayne's teachings are directed to the production of concentrated wort, "the combination of Kinsman and Bayne does not make the claimed method obvious." *Id.* Furthermore, the Appellant relies on *In re Rinehart*, 531 F.2d 1048, 1052-1054 (CCPA 1976), to support the argument that the Examiner did not demonstrate that the method suggested by the combination of prior art references would be capable of being scaled up to commercial quantities. App. Br. 11-15. According to the Appellant, "[n]either Kinsman nor Bayne suggests the capability of achieving commercial scale production (8 to 13 barrels) of unconcentrated hopped wort." *Id.* at 15.

For the reasons thoroughly given by the Examiner at pages 9-11 of the Answer, the Appellant's arguments do not persuade us of any error that justifies reversal of the rejection. The Appellant is correct that neither Kinsman nor Bayne explicitly teaches that the prior art methods could be scaled up to commercial quantities. But "the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take into account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). We find the Examiner's obviousness analysis regarding the commercial scale up to be reasonable and, indeed, consistent with *KSR*. *Id.* at 419 ("In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends.").

*Rinehart* does not support the Appellant's position. In *Rinehart*, the court reversed the board because the board did not properly consider unrebutted testimony in the form of an inventor's affidavit demonstrating that the process of the prior art references cannot be scaled up satisfactorily. *Rinehart*, 531 F.2d at 1053. Here, by contrast, the Examiner found that the Appellant "provide[d] no facts or reasoning besides the [argument that the] process as claimed is not explicitly taught by a reference." Ans. 10; *see also* the Evidence Appendix section of the Appeal Brief (stating "None"). That is, the Appellant failed to offer any reasoning, let alone persuasive evidence,

Appeal 2011-012146  
Application 11/800,752

*why* a person of ordinary skill in the art would not have had a reasonable expectation of success in scaling up the method suggested by the prior art. Therefore, we find the Examiner's obviousness conclusion to be free from error. *Rinehart*, 531 F.2d at 1053 ("Absent the evidence in Rinehart's affidavit, use of commercial quantities in the processes of the references would have been obvious.").

#### SUMMARY

The Examiner's rejection under 35 U.S.C. § 103(a) of claims 42-49 and 51 as unpatentable over Kinsman in view of the combination of Bayne and the Appellant's discussion of the prior art in the Specification 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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