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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTIAN ANTHONY COLO,
JOHN JOSEPH WOLF, ANNE MCCANDISH EMENHISER,
ERIC ANTHONY HANSON, CHRISTINA MAYADAS
LAWRENCE, and ROBERT LAVENTURE FLETCHER

Appeal 2017-004497
Application 13/254,310
Technology Center 1700

Before: MICHAEL P. COLAIANNI, AVELYN M. ROSS, and
JANE E. INGLESE, *Administrative Patent Judges*.

ROSS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Appellants appeal under 35 U.S.C. § 134(a) from a rejection of claims
1, 2, 4–9, 26, 29–38. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ In our Decision we refer to the Specification filed September 1, 2011 (“Spec.”), the Non-Final Office Action appealed from dated February 1, 2016 (“Non-Final”), the Appeal Brief filed August 1, 2016 (“Appeal Br.”), the Examiner’s Answer dated November 28, 2016 (“Ans.”) and the Reply Brief filed January 27, 2017 (“Reply Br.”).

STATEMENT OF THE CASE

The subject matter on appeal relates to a customized children's feeding system and methods for customizing children's nutrition. Spec. 6. According to the Specification, the system

provides a packaged food product including a tray defining at least three compartments. The packaged food product also includes a removable food cartridge including an individual food product sealed in each of the food cartridges. The food cartridges are located in each of the compartments. Each food cartridge and compartment can be associated with a corresponding color that is representative of a food category. The shape of the food cartridges can be the same shape as the compartments.

Id. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A packaged food product comprising:

a tray having an outer edge and defining at least three compartments, wherein the outer edge has at least three indentions corresponding to the at least three compartments; and

a removable food cartridge located in each of the compartments, the removable food cartridge comprising a food product sealed therein, wherein the food product in each food cartridge is from a different food category than the food product in the other cartridges, and

wherein each of the food cartridges comprises a snap-in element having a shape selected from the group consisting of a square, a triangle, a circle, an oval, a star, and a rectangle that connects to a corresponding receiving aperture in the compartments, wherein the snap-in element of each food cartridge has a different shape than the snap-in elements of the other food cartridges, and

wherein each shape of the snap-in elements is representative of a different food category corresponding to the food product sealed in each food cartridge, and

wherein the receiving aperture of each compartment has a different shape than the apertures of the other compartments such

that each food cartridge corresponds to only one compartment defined by the tray.

Appeal Br. 23 (Claims App'x).

REJECTIONS

The Examiner maintains the following rejections:

- A. Claims 1, 2, 4, 7–9, 26, and 29–31 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wigfield² in view of Sato³ and Krebs⁴, and in further view of Jacquin⁵, Mucciacciaro⁶, Russell⁷, and Gilbilisco.⁸ Non-Final 3.
- B. Claims 4 and 32 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Wigfield and further in view of either Grossman⁹ or Beppu.¹⁰ *Id.* at 11.

Appellants request reversal of Rejections A and B. *See generally* Appeal Br. Appellants present arguments in support of claim 1 and do not separately argue independent claims 26 and 31 or dependent claims 2, 4, 7–9, 29, and 30. *Id.* at 21–22. Therefore, we focus our discussion on

² Sally-Anne Wigfield, WO 2004/078599 A2, published September 16, 2004 (“Wigfield”).

³ Takao Sato, JP 2005092261 A, published April 7, 2005 (“Sato”).

⁴ Krebs, et al., US 2006/0172043 A1, published August 3, 2006 (“Krebs”).

⁵ Yves Emmanuel Jacquin, FR 2597740 A, published October 30, 1987 (“Jacquin”).

⁶ Domenic Mucciacciaro, US 5,239,491, issued August 24, 1993 (“Mucciacciaro”).

⁷ Larry L. Russell, US 5,975,628, issued November 2, 1999 (“Russell”).

⁸ Kenneth J. Gilbilisco, US 5,267,650, issued December 7, 1993 (“Gilbilisco”).

⁹ Arthur M. Grossman, US D194,054, issued November 13, 1962 (“Grossman”).

¹⁰ Yoshio Beppu, US 5,560,653, issued October 1, 1996 (“Beppu”).

independent claim 1 and the remaining claims stand or fall with claim 1.
37 C.F.R. § 41.37(c)(1).

OPINION

The Examiner rejects claim 1 as obvious over Wigfield, Sato, Krebs, and in view of Jacquin, Mucciacciaro, Russell, and Gilbilisco. The Examiner finds that Wigfield discloses a tray having three compartments having removable food storage cartridges located in each compartment. Non-Final 3. The Examiner finds that the foods are contained in separate packages indicating that the packages are sealed and further that the compartments can include a lid. *Id.* In addition, the Examiner finds that Sato teaches a tray holding packaged food product cartridges where the cartridges are sealed. *Id.* at 3–4. The Examiner reasons that providing sealed cartridges would have been obvious to ensure that the food product is free from contamination. *Id.* at 4. The Examiner also finds “that Wigfield teaches providing cartridges where each cartridge is representative of a different food group” and that Krebs similarly teaches that “it has been conventional to provide foods in food cartridges that contain food from a different food category than the food product in the other cartridges.” *Id.* The Examiner additionally finds that Wigfield “already teaches using indicia and color coding for the purpose of ensuring that the user consumes the requisite varieties of food” (*Id.* at 6) and Jacquin teaches different shaped cartridges (and color coding) control the types of containers that may be placed in the tray. *Id.* at 5. Further, the Examiner finds that “Mucciacciaro teaches protuberances and corresponding apertures that a specific container can only be associated with a specific compartment on the tray” and further

that Russell teaches interlocking elements, i.e., a snap-in element, for securing the food containers to the tray. *Id.* The Examiner reasons that these features would have been obvious to one skilled in the art in order to control the location of food containers on the tray. *Id.* The Examiner also reasons that providing apertures with different shapes in different compartments would have been obvious to one skilled in the art to “ensure[s] that food cartridges were securely retained within each compartment of the tray and for the purpose of using another conventional expedient that would control into which compartment . . . a specific container be received.” *Id.* at 7. Lastly, the Examiner finds that Gilbilisco teaches a tray having compartments “where the tray further comprises an outer edge that has at least three indentations corresponding to the at least three compartments for the purpose of facilitating removal of the inner container from the compartment of the tray.” *Id.*

Appellants argue that the Examiner ignores relevant portions of the references which teach away from combining the references in a manner to reach the claimed invention and that only through hindsight can the Appellants’ claim be achieved. Appeal Br. 12. With respect to the Sato reference, Appellants urge that Sato teaches a single compartment that holds multiple cartridges and that the configuration of the single compartment “is important for accepting various different configurations of food cartridges.” *Id.* at 16.

Appellants fail to identify any reversible error. First, the Examiner relies upon Sato to teach a sealed food cartridge. But, the Examiner finds that *both* Wigfield and Sato teach including a seal or a lid to prevent contamination of the food contained within the food cartridges. Non-Final

3–4. Because Wigfield independently teaches sealing the individual cartridges, any criticism of Sato is moot. *See* Wigfield 8, 9 (describing each cartridge as having a lid), and 10 (explaining that the packaging may comprise a film or foil covering one or more cartridges and is applied by heat sealing of vacuum packing). Appellants do not dispute these findings by the Examiner. We adopt these findings as fact. *Cf. In re Kunzmann*, 326 F.2d 424, 425 n.3 (CCPA 1964) (a finding not shown by the Appellants to be erroneous may be accepted as fact).

Second, to teach away, a reference must discourage one of ordinary skill in the art from following the path set out in the reference, or lead that person in a direction divergent from the path taken by the applicant. *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994). Here we find nothing in Sato—and Appellants do not identify any teaching—that would discourage the skilled artisan from sealing the food cartridges even knowing that Sato’s drawings depict only a single compartment tray. Furthermore, Appellants suggestion that a single compartment tray is important to Sato’s purpose is not supported by evidence of record and is based instead on unsubstantiated attorney argument. Such attorney argument has low probative value. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997). Attorney argument is not evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974).

Third, we find no evidence that the Examiner relies on impermissible hindsight reasoning as the Examiner’s articulated reasons for combining the teachings of Wigfield and Sato are supported by the prior art disclosures themselves. *See, e.g., Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570 (Fed. Cir. 1996) (citing *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138 (Fed. Cir. 1985)) (“The invention must be viewed not after the

blueprint has been drawn by the inventor, but as it would have been perceived in the state of the art that existed at the time the invention was made.”). Here, as the Examiner explains (Ans. 13–14), the references themselves teach that providing a seal or a lid to prevent contamination is conventional. We discern no error in these findings and conclusions. Moreover, Appellants do not identify any knowledge relied upon by the Examiner that was gleaned only from the Appellants’ disclosure and was not within the level of skill in the art at the time of the invention. *In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971).

Next, Appellants contend that Krebs fails to teach cartridges that fit into different compartments or that the cartridges are shaped similarly to the compartments. Appeal Br. 17.

Appellants’ argument is not persuasive of reversible error. The Examiner relies on *both* Wigfield and Krebs to teach that the food in each cartridge is from a different food category than the other cartridges. Non-Final 4; Ans. 14. For example, Wigfield “presents methods of providing a balanced meal comprising the five essential food groups *via* provision of the packaging of the invention, or *via* provision of a selection of at least five receptacles containing foodstuff, each of which is colour-coded to identify the respective food group to which the foodstuff therein belongs.” Wigfield, Abstract. Appellants do not dispute the findings by the Examiner with respect to Wigfield. We adopt these findings as fact. *Cf. In re Kunzmann*, 326 F.2d at 425 n.3. Because Wigfield independently teaches the identified limitation, resort to Krebs is unnecessary to support the rejection. And, as the Examiner explains, it “is not seen to teach away from and is not seen to rely on hindsight because Wigfield also teaches a similar concept.” Ans. 14.

Appellants also argue that while Jacquin teaches a container having compartments of different shapes, “the shapes do not correspond to the projections on food cartridges that prevent placing more than one type of food cartridge on the tray.” Appeal Br. 17.

Appellants’ argument that the shapes of the containers do not correspond to projections on food containers fails persuade us of reversible error. “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). Rather, “[t]he test [for obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). The Examiner relies upon Jacquin to teach that “shapes of the compartments control the specific types of containers that can be placed into the tray,” and that it is desirable to control the placement of food containers on a tray. Non-Final 5; Ans. 15. Appellants’ argument amounts to an attack on Jacquin individually and fails to address the combined teachings as presented by the Examiner.

And, with respect to the Mucciacciaro reference, Appellants contend that the reference relates to medicine storage which is unrelated to a “food tray or encouraging a balanced diet.” Appeal Br. 18.

Appellants do not convince us of reversible error by arguing that Mucciacciaro is nonanalogous art. To rely upon a reference as a basis for an obviousness rejection of Appellants’ claims, the reference must either (1) be in the field of the inventor’s endeavor or (2) be reasonably pertinent to the particular problem with which the inventor was concerned. *In re Kahn*, 441 F.3d 977, 986–87 (Fed. Cir. 2006); *In re Oetiker*, 977 F.2d 1443, 1447 (Fed.

Cir. 1992). Here, as the Examiner explains “Mucciacciaro teaches that teach [sic] shape is representative of each a particular medication . . . [which] is seen to be analogous to each shape of snap in element and receiving aperture being representative of a particular food category.” Ans. 15. Furthermore, while related to medicine storage, the Examiner explains the “technique [of Mucciacciaro] can be equally applicable to food trays in view of Jacquin who also teaches controlled placement of containers on a food tray.” Ans. 15. Thus, Mucciacciaro is reasonably pertinent to the problem faced by the inventor, that is, particularized placement of items by category on a tray.

Appellants also argue that the “Examiner disregards that Russell teaches that each and every projection is the same shape . . . [and] that the purpose of each projection being the same shape is the ability to mix and match utensils (e.g., plates, cups) on different areas of the tray rather than only one specific location.” Appeal Br. 19.

We are not persuaded by Appellants’ arguments. Contrary to Appellants’ argument, the projections of Russell are not *limited* to being the same shape or to an embodiment that broadly permits interchangeability of utensils on all locations of the tray. In particular, Russell explains that in one embodiment “the projections could be differently shaped on different areas of the surface so that, for example, the bowl would only fit where a bowl should be placed, a cup where a cup should be placed, etc.” Russell col. 2, ll. 45–49. Thus, we agree with the Examiner that Russell suggests “changing the configurations of the apertures and projections would have been advantageous for controlling the position of the food container on the tray, for securing food on the tray.” Ans. 15–16.

Lastly, Appellants contend that unlike the claimed invention, Gilbilisco relates to a medicine storage unit that is child proof, where the claimed invention aims to “encourage a healthy diet for children.” Appeal Br. 19.

Appellants’ arguments reveal no reversible error by the Examiner. The use of a depression around the perimeter of a tray to facilitate release of a cartridge contained therein has uses that extend beyond medicine storage trays. As the Supreme Court explained,

[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 417 (2007). Here, the Examiner finds that Wigfield already teaches use of food trays to encourage a healthy diet and that the structure of Gilbilisco, having depressions at the perimeter to facilitate easy removal of cartridges within compartments of a medication tray, would likewise improve a food tray having a similar structure, i.e., a tray with multiple compartments having removable cartridges placed therein. Ans. 17. Therefore, we ascertain no reversible error in the Examiner’s factual findings or conclusion of obviousness.

Appellants also argue that the Examiner has failed to provide a reason why the person skilled in the art “would have searched far and wide among the variety of cited references – including references that are directed to

medication storage – to piecemeal individual features of each reference all at once in order to arrive at the presently claimed invention.” Appeal Br. 20.

Without more, we are not convinced of reversible error. As the Examiner explains, the motivation to modify Wigfield in the manner suggested originated with the prior art. Ans. 18–19. For example, the Examiner reasons that a person of ordinary skill in the art would modify Wigfield to provide a seal, should it need to be modified by Sato, in order to protect the food in each cartridge from contamination. Non-Final 4; Ans. 18. The Examiner also explains that should Wigfield need to be modified to provide cartridges where each cartridge is representative of a different food group, as taught by Krebs, the skilled artisan would have been motivated “based on the particular type nutritional profile desired from the packaged food.” Non-Final 4. The Examiner further concludes that Jacquin, Mucciacciaro, and Russell, each suggest “the desirability of controlling the placement of food cartridges into a tray by matching the shape of the cartridge to that of the compartment in the tray” by using protrusions and corresponding apertures within the tray. Ans. 18; Non-Final 5–6. The Examiner further explains that the skilled artisan would have reason to modify Wigfield to include a snapping connection to prevent movement of the cartridges on the tray, to limit placement of the cartridges on the tray, and to create a matching game. *Id.* And, the Examiner explains one skilled in the art would be motivated to include indentations on the outer rim of the tray to aid in the removal of the cartridges from the respective compartments of the tray. Ans. 18; Non-Final 7–8. Appellants do not dispute the specific reasoning employed by the Examiner in combining the references. *See generally* Appeal Br. Instead, Appellants appear to contend that the number

of references used suggests hindsight. However, this is not the law; “[t]he criterion . . . is not the number of references, but what they would have meant to a person of ordinary skill in the field of invention.” *In re Gorman*, 933 F.2d 982, 986 (Fed. Cir. 1991). Thus, Appellants’ arguments do not persuade us the Examiner relies on impermissible hindsight reasoning as the Examiner’s articulated reasons for combining the teachings of Wigfield with Sato, Krebs, Jacquin, Mucciacciaro, Russell, and Gilbilisco, are supported by the prior art disclosures. *Sensonics*, 81 F.3d at 1570.

Lastly, Appellants—for the first time in the Reply Brief—contend that certain factors, including (1) the fact that no single prior art reference teaches more than two claimed elements, (2) the length of time between publication dates of prior art references, (3) the crowded field of the instant invention, and (4) the need in the art for a system for a nutritional system for children, each weigh in favor of nonobviousness. Reply Br. 5–6. Appellants have not explained, nor is it apparent, that these arguments were necessitated by the Examiner’s Answer or could not have been presented in the principal brief. Therefore, these arguments are untimely and we will not reach arguments presented for the first time in a reply brief in the absence of good cause. 37 C.F.R. §41.41(b)(2).

CONCLUSION

Appellants failed to identify a reversible error in the Examiner’s rejection of claims 1, 2, 4, 7–9, 26, and 29–31 under 35 U.S.C. § 103(a) as unpatentable over Wigfield in view of Sato and Krebs, and in further view of Jacquin, Mucciacciaro, Russell, and Gilbilisco.

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Appellants failed to identify a reversible error in the Examiner's rejection of claims 4 and 32 under 35 U.S.C. § 103(a) as unpatentable over Wigfield and further in view of either Grossman or Beppu.

DECISION

For the above reasons, the Examiner's rejection of claims 1, 2, 4-9, 26, and 29-38 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).

AFFIRMED