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EXAMINER

STULII, VERA

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CURT JONES

Appeal 2018-003157
Application 14/815,109
Technology Center 1700

Before KAREN M. HASTINGS, JEFFREY B. ROBERTSON, and
WESLEY B. DERRICK, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ requests our review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 1–12, 14–19, 22 and 23 under 35 U.S.C. § 103(a) over the combined prior art of Lynn (US 2010/0287951 A1, published Nov. 18, 2010), and Melvin (US 2010/0062134 A1, published Mar. 11, 2010). The Examiner also rejected the claims on the basis of nonstatutory double patenting based on US 9,107,444 with Melvin as well as a provisional rejection on the basis of nonstatutory double patenting based on copending application no. 15/138,583 (e.g., Ans. 3, 4; Non-final Action 3, 4).

¹ The real party in interest is stated to be Beaded Distribution Company, LLC (Appeal Br. 2).

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

We AFFIRM.

Independent claim 1 is illustrative of the subject matter on appeal:

1. A method for manufacturing a mixed drink comprising:
combining one or more non-alcoholic ingredients with one or more
alcoholic ingredients to form a liquid mix formulation;
cryogenically freezing the liquid mix formulation to form a
plurality of cryogenically frozen beads of the liquid mix formulation
by dripping the liquid mix formulation into liquid nitrogen; and
combining the frozen beads with a first liquid to form the
mixed drink.

Independent claim 9 is similarly directed to a method of making a
mixed drink using cryogenically frozen beads of alcoholic and non-alcoholic
ingredients (Claims Appendix 13).

At the outset, we note that Appellant does not argue the rejections
based on nonstatutory obviousness-type double patenting (Appeal Br. 7).
Thus, we summarily affirm these rejections.

ANALYSIS

Upon consideration of the evidence on this record and each of
Appellant's contentions, we find that the preponderance of evidence
supports the Examiner's conclusion that the subject matter of Appellant's
claims is unpatentable over the applied prior art. We sustain the Examiner's
§ 103(a) rejection essentially for the reasons set out by the Examiner in the
Answer.

We add the following primarily for emphasis.

It has been established that "the [obviousness] analysis need not seek
out precise teachings directed to the specific subject matter of the challenged

claim, for a court can take 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). Likewise, it is also well settled that a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in the art would have reasonably been expected to draw therefrom. *See In re Fritch*, 972 F.2d 1260, 1264–65 (Fed. Cir. 1992).

Appellant’s principal argument regarding claim 1 (and claim 9) is that there is no reason to arrive at cryogenically frozen beads having both alcoholic and non-alcoholic ingredients which are then combined with a liquid to form a mixed drink based on Lynn and Melvin since Lynn is directed to non-alcoholic frozen beads and Melvin is directed to alcohol containing frozen beads useful as a single phase frozen dessert product, thus their teachings are “incongruent” (Appeal Br. 7) and the “applied combination teaches away from the combination of a frozen beaded alcoholic mix with any liquid” (Appeal Br. 8). Appellant also presents separate arguments to claims 9 and 10, arguing that preparing yet another frozen bead formulation to mix with the first alcoholic frozen beads is not taught or suggested (Appeal Br. 10). These arguments are reiterated in the Reply Brief.

Appellant’s arguments do not appreciate the teachings and inferences of the applied prior art as whole, and are not persuasive of reversible error for at least the reasons set out by the Examiner (Ans. 10–12). Whether a reference teaches away from a claimed invention is a question of fact. *In re*

Harris, 409 F.3d 1339, 1341 (Fed. Cir. 2005).² The Examiner aptly points out that, contrary to the Appellant’s position, one of ordinary skill would have readily inferred that a mixture of both alcoholic and non-alcoholic ingredients in a frozen bead form as exemplified in Melvin (e.g., Melvin ¶¶ 70, 73, Abstract), would also predictably be useful as frozen beads to be used with another liquid component to make a drink, as exemplified in Lynn (e.g., Lynn ¶¶ 21, 22, 25; Ans. *generally*). See *In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (“The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art”); *In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) (“Combining the teachings of references does not involve an ability to combine their specific structures.”).

Further, as we “take account of the inferences and creative steps that a person of ordinary skill in the art would employ,” we find a person of ordinary skill in the art would have, within their level of skill, made frozen beads of both alcoholic and non-alcoholic ingredients (as exemplified in Melvin) to be mixed with other liquids, alcoholic or non-alcoholic (as suggested by Lynn), for a mixed drink (as recited in claims 1 and 9), and/or to be mixed with an additional frozen bead formulation (as recited in claim 9), based on the combined teachings of the applied prior art for reasons articulated by the Examiner (*see generally* Ans.). *KSR Int’l*, 550 U.S. at 418; *see also id.* at 421 (“A person of ordinary skill is also a person of

²*Cf. Ricoh Co., Ltd. v. Quanta Computer Inc.*, 550 F.3d 1325, 1332 (Fed. Cir. 2008)(a reference can distinguish prior art in order to show the novelty of an invention without teaching away from combining the prior art with the invention disclosed in the reference.).

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ordinary creativity, not an automaton”); *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009) (under the flexible inquiry set forth by the Supreme Court, the PTO must take account of “the inferences and creative steps,” as well as routine steps, that an ordinary artisan would employ)).

Accordingly, we affirm the Examiner’s prior art rejection of the claims under 35 U.S.C. § 103(a) for the reasons given above and presented by the Examiner.

DECISION

The Examiner’s § 103(a) rejection is affirmed.

TIME PERIOD FOR RESPONSE

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