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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DANIEL R. GREEN, JEKATERINA SEVEROVA-EPP, and THOMAS M. JARL

Appeal 2018-008682
Application 14/538,303
Technology Center 1700

Before CATHERINE Q. TIMM, JEFFREY T. SMITH, and KAREN M. HASTINGS, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant[1] appeals under 35 U.S.C. § 134(a) from the Examiner's rejections of claims 1–7 under 35 U.S.C. § 103(a) as being unpatentable based on at least the combined prior art of Haag (US 4,075,356, issued Feb. 21, 1978), Decelles (US 3,868,471, issued Feb. 25, 1975), Fast (US

[1] We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant indicates the real party-in-interest is General Mills Inc. App. Br. 4.

3,318,706, issued May 9, 1967), and Richey (US 2005/0064087 A1, published Mar. 24, 2005).[2] We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

Claim 1 is illustrative of the claimed subject matter:

1. A method of making a food composition, comprising:
a. providing a stream of uncoated food pieces;
b. directing the stream through an enrober to apply a first coating to at least a portion of a surface of each food piece to form a coated stream;
c. drying the coated stream to produce a stream of dried coated food pieces;
d. splitting the stream of dried coated food pieces into at least two stream portions using a splitting apparatus,
e. selecting a stream portion representing from about 20% to about 65% of the stream of dried coated pieces; and
f. continuously redirecting the selected stream portion using a pneumatic conveyor, a belt conveyor, a chain conveyor, a screw conveyor, a vibrating conveyor, a roller conveyor, or a combination thereof back through the enrober along with the stream of uncoated food pieces to apply at least one additional coating to the portion of the coated stream to produce a food composition comprising a plurality of food pieces, wherein food pieces having 1 coating layer represent about 35% to about 80% of the plurality of food pieces, food pieces having 2 coating layers represent about 16% to about 23% of the plurality of food pieces, and food pieces having at least 3 coating layers represent about 4% to about 42% of the plurality of food pieces.

[2] The rejection of claims 5, 6, and 7 include additional prior art of Green (US 2005/0266142 A1, published Dec. 1, 2005) for claim 5 and Furda (US 4,379,171, issued Apr. 5, 1983) for claims 6 and 7 (Final Action 6, 7). A discussion of these references is not necessary for disposition of this appeal.

ANALYSIS

The Examiner has the initial burden of establishing a prima facie case of obviousness based on an inherent or explicit disclosure of the claimed subject matter under 35 U.S.C. § 103. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) ("[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability."). "[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." *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (*quoted with approval in KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)).

After review of the respective positions provided by Appellant and the Examiner, we agree with Appellant that the Examiner has not met the applicable burden in this case. A preponderance of the evidence supports Appellant's assertions that the Examiner's rejection is based on improper hindsight in proposing to modify Hang to have the configuration of elements necessary to perform the steps the steps of drying, splitting the dried stream into at least two stream portions, and continuously redirecting on a conveyor a selected one of the split streams as required by claim 1.

Appellant's arguments focus on the lack of a reason to modify Haag's process and structure so as to result in the claimed steps (*e.g.*, Appeal Br. 9–17; Reply Br. 2–4). Notably, Haag teaches that it is only "by reason of a random displacement" that some material may be reintroduced to the first zone of Haag's rotating drum and thus be recoated with, e.g., a fat coating,

before being advanced to the second zone of Haag's rotating drum, which may apply, e.g., a syrup (Haag col. 4, l. 66–col. 5, l. 8 and col. 5, ll. 55–65).

Accordingly, a preponderance of the evidence supports Appellant's position that the Examiner is using impermissible hindsight to reconstruct Haag with Decelles, Fast, and Richey. The Examiner has not adequately explained why the skilled artisan's knowledge or inferences and creativity would have supported the obviousness determination based on the teachings of the applied references without an improper hindsight reconstruction. 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*, 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")).

The Examiner does not establish that the references as applied in the § 103 rejections of dependent claims 5, 6, and 7 cure these deficiencies and/or otherwise provides another rationale that cures these deficiencies.

Accordingly, we reverse the § 103 rejections on appeal.

DECISION

We reverse the Examiner's decision .

Claims Rejected	Basis	Affirmed	Reversed
1–4	§ 103 Haag, Decelles, Fast, and Richey		1–4
5	§ 103 Haag, Decelles, Fast, Richey, and Green		5
6, 7	§ 103 Haag, Decelles, Fast, Richey, and Furda		6, 7
Overall Outcome			1–7

REVERSED