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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TILLMANN DORR
and BERND HASSLINGER

Appeal 2019-001878
Application 14/424,181
Technology Center 1700

Before BEVERLY A. FRANKLIN, RAE LYNN P. GUEST, and GEORGE
C. BEST, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the
Examiner's decision to reject claims 1–4 and 9–13. We have jurisdiction
under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R.
§ 1.42(a). Appellant identifies the real party in interest as Südzucker AG.
Appeal Br. 2.

CLAIMED SUBJECT MATTER

Claim 1 is illustrative of Appellant's subject matter on appeal and is set forth below:

1. A process for coating chocolate cores comprising the steps of:
 - a) providing at least one chocolate core to be coated,
 - b) applying to the at least one chocolate core a first liquid medium comprising a whitening agent, so as to obtain at least one layer of a pre-coating, wherein the first liquid medium comprises 0.8 to 20% by weight of the whitening agent, based on the total dry solids of the pre-coating, wherein the whitening agent is TiO_2 ,
 - c) solidifying the at least one layer of the pre-coating, so as to obtain at least one pre-coated chocolate core, and
 - d) applying to the at least one pre-coated chocolate core a second liquid medium comprising isomaltulose and a binding agent coating 2, so as to obtain at least one layer of a second coating, wherein the second liquid medium comprises 1 to 10% by weight of the binding agent coating 2, based on the total dry solids of the second coating, and wherein the second liquid medium is free of TiO_2 ,wherein the total coating comprising the first and second coating comprises 10 to 40% by weight of the first coating and 60 to 90% by weight of the second coating, each based on dry weight of total coating,
wherein at least one of the first and the second liquid medium is applied to the cores by spraying, at a spraying pressure of from 10 to 100 bar, and wherein optionally the steps b) and c) are repeated at least 2 times as to build up more than one layer of the pre-coating.

REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Latini et al.	US 5,495,418	Feb. 27, 1996
Rapp et al.	US 2008/0050605 A1	Feb. 28, 2008
Hasslinger et al.	US 2009/0214699 A1	Aug. 27, 2009
Rapp	WO 2006/040144	Apr. 20, 2006
Andrade et al (“Atomizing Spray Systems for Application of Edible Coatings” Comprehensive Reviews in Food Science and Food Safety Volume 11, April 2012, pages 323–337.		

REJECTIONS

Claim 1–4, 9, 10, 12 and 13 are rejected under pre-AIA 35 U.S.C. § 103(a) as obvious over Hasslinger in view of Latini, as evidenced by Rapp ’605, or alternatively, over Hasslinger in view of Andrade.

Claim 11 is rejected as being obvious under 35 U.S.C. § 103(a) over Hasslinger in view of Latini, as evidenced by Rapp ’605, and further in view of Rapp ’144, or alternatively over Hasslinger in view of Andrade and further in view of Rapp ’144.

OPINION

For purposes of this appeal, we address separately argued claims, and the remaining claims stand or fall with the argued claims, consistent with 37 C.F.R. § 41.37(c)(1)(iv) (2017). We thus consider claims 1 and 11 in this appeal.

Upon consideration of the evidence and each of the respective positions set forth in the record, we find that the preponderance of evidence supports the Examiner’s findings and conclusion that the subject matter of Appellants’ claims is unpatentable over the applied art. Accordingly, we

sustain each of the Examiner's rejections on appeal for the reasons set forth in the Final Office Action and in the Answer, and affirm, as emphasized below.

We refer to the Examiner's statement of the rejection as set forth on pages 3–5 of the Answer. Appellant's arguments are presented on pages 5–7 of the Appeal Brief and on pages 4–5 of the Reply Brief.

Appellant argues that the prior art references do not teach 10–40% of a first coating, and 60–90% of a second coating as claimed. This argument is unpersuasive. As the Examiner states on pages 6–7 of the Answer, the recited coating percentages claimed are based on dry weight, and Hasslinger teaches that in a preferred embodiment the total coating comprises the first and second coating, wherein the first coating comprises 40–90% by dry weight of the total coating and the second coating comprises 10–60% by dry weight of the total coating (Hasslinger, ¶ 0040) which touches the claimed ranges. A “claimed invention is rendered prima facie obvious by the teachings of a prior art reference that discloses a range that touches the range recited in the claim.” *In re Geisler*, 116 F.3d 1465, 1469 (Fed. Cir. 1997) (citing *In re Malagari*, 499 F.2d 1297, 1303 (CCPA 1974)).

Appellant also argues that because the preferred range of the first coating by dry weight disclosed by Hasslinger is 50–90%, even more preferably 60–90%, the disclosure teaches away from the use of 40% or less of the first coating and the disclosed preferred range of 40–90%. In a similar manner, Appellant also argues the use of 60–90% of the second coating is non-obvious. We are unpersuaded by this line of argument and agree with the Examiner's stated position made on page 7 of the Answer.

“Nonpreferred disclosures can be used. A nonpreferred portion of a

reference disclosure is just as significant as the preferred portion in assessing the patentability of claims.” *In re Nehrenberg*, 280 F.2d 161 (CCPA 1960).

Appellant also argues that the applied art does not teach the first and/or second liquid medium is applied to the core by spraying wherein the pressure is from 10–100 bar. Appeal Br. 5–7. We agree with the Examiner’s stated response made on pages 7–8 of the Answer. Therein, the Examiner states that although Hasslinger does not specifically state that the coating method is spraying, Hasslinger does teach that the coating process is conducted by a Driacoater 500/600 (Hasslinger, ¶ 0088), and that Rapp ’605 evidences that this device is a known spraying device (Rapp ’605, ¶¶ 0028, 0112, 0124 and 0129). The Examiner also refers to the reference of Andrade (alternatively) for teaching different methods of coating edible foods (Andrade, Abstract). Ans. 8. The Examiner finds that Andrade teaches that spray coating is the most commonly used technique for applying food coatings as it offers many advantages including uniform coatings, thickness control, the possibility of multilayer applications, automation and continuous production (Andrade, p. 323 col. 2, last full paragraph, and p. 326, second paragraph). We thus agree with the Examiner that these teachings suggest the technique of spraying.

Regarding the spraying pressure of 10–100 bars as recited in claim 1, we also agree with the Examiner’s response made on page 8 of the Answer. Therein, the Examiner states that Latini teaches a method for coating center materials, such as chocolate with syrup like coatings, using a pressure for spraying of 300–600 psi (about 20.7–41.4 bars) for solution atomization and to eliminate the possibility of a clogged spray tip. Latini, Abstract, col. 1, ll. 3–22, col. 2, ll. 35–44, and col. 7, ll. 13–28. The Examiner concludes that it

would have been obvious to utilize a spray pressure in Hasslinger's coating method to be about 20.7–41.4 bars for solution atomization, and to eliminate the possibility of a clogged spray tip, in view of Latini. We agree. The Examiner also alternatively relies upon Andrade, and we agree with the Examiner's statements regarding Andrade's teachings as set forth on pages 8 and 9 of the Answer in further support of the suggestion of the use of spraying at the claimed pressure.

Appellant argues secondary considerations on pages 9–10 of the Appeal Brief. Therein, Appellant states that surprisingly the process of the present application provides a more even and regular distribution of the second coating; and that by application of the precoating, the brilliance of the food color applied to the chocolate cores in the second coating is preferably improved; and by spraying under a high pressure, liquid media are distributed extremely finely and regularly which results in a smooth surface of small liquid droplets over a small surface area. Appellant refers to Examples 1, 2, and 3 of the Specification in this regard. Appeal Br. 9. We are unpersuaded by this line of argument for the reasons provided by the Examiner on pages 10–11 of the Answer. The burden rests with Appellant to establish (1) that the alleged unexpected results presented as being associated with the claimed invention are, in fact, unexpected, (2) that the comparisons are to the disclosure of the closest prior art, and (3) that the supplied evidentiary showing is commensurate in scope with the claimed subject matter. *See In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972).

Beginning on page 4 of the Reply Brief, Appellant argues that, while Hasslinger teaches that the coating process is carried out by a Driacoater 500/600, Hasslinger does not specifically teach that the coating process is

carried-out by spraying, and in particular, by spraying under high pressure as claimed by the Appellant. Appellant argues that while Rapp '601 discloses that the Driacoater 500/600 can be used as a spraying device, the application of the first and/or the second liquid medium by spraying is not unambiguously obvious in view of Rapp '601 by using a Driacoater 500/600. Appellant argues that the Driacoater 500/600 is a highly flexible coating system and refers to the "Driacoater 500/600" product brochure provided as an attachment to the Reply Brief in this regard. Reply Br. 4. Appellant argues that the brochure discloses different kinds of film and suspension coatings of tablets, capsules, granules and pellets which can be carried out with the use of a Driacoater 500/600. Appellant submits that the simple fact that spraying under a variety of different kinds of coating methods can be carried out using a Driacoater 500/600, does not motivate the skilled person to use exactly the spraying method for preparing the first coating and the second coating in a coating process as claimed in the present application. Reply Br. 4. Appellant states that Rapp '601 is related to pan coating processes, which are related to a coating method wherein cores are moved in a solution, and argues this is different from coating a core by spraying.

We are unpersuaded by these arguments. The Examiner relied upon Hasslinger for teaching coating of cores using a Driacoater 500/600, and relies upon Rapp '601 as evidence that a Driacoater 500/600 is a device known to be used for spraying coatings. We agree with the Examiner that these teachings provide the suggestion to spray coat Hasslinger's coating for the reasons discussed by the Examiner in the record. The Examiner relies upon Latini and Andrade for suggesting the pressure claimed. The test for

obviousness is what the combined teachings of the references would have suggested to those of ordinary skill in the art; one cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references. *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991); *In re Merck & Co.*, 800 F.2d 1091, 1097-98 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981).

In view of the above, we affirm Rejection 1. We note that with regard to Rejection 2, Appellant argues that Rapp '144 does not cure the deficiencies of the combination of references applied in Rejection 1. Appeal Br. 7–9. However, for the reasons discussed above involving Rejection 1, we are unpersuaded by this line of argument, and affirm Rejection 2 for the same reasons that we affirmed Rejection 1.

CONCLUSION

We affirm the Examiner's decision.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4, 9,10, 12, 13	103	Hasslinger, Latini, Rapp '605, Andrade	1–4, 9,10, 12, 13	
11	103	Hasslinger, Latini, Rapp '605, Rapp '144, Andrade	11	
Overall Outcome			1–4, 9–13	

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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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED