



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
**United States Patent and Trademark Office**  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/481,933	04/07/2017	Craig Steven Reichert	047177-9395-US01	1568
23409	7590	06/04/2020	EXAMINER	
MICHAEL BEST & FRIEDRICH LLP (Mke) 790 N WATER ST SUITE 2500 MILWAUKEE, WI 53202			TADESSE, MARTHA	
			ART UNIT	PAPER NUMBER
			3763	
			NOTIFICATION DATE	DELIVERY MODE
			06/04/2020	ELECTRONIC

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

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mkeipdocket@michaelbest.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* CRAIG STEVEN REICHERT

---

Appeal 2019-002165  
Application 15/481,933  
Technology Center 3700

---

Before PHILIP J. HOFFMANN, JAMES A. WORTH, and  
CYNTHIAL .MURPHY, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellant<sup>1</sup> appeals from the Examiner’s rejections of claims 1–20. We sustain none of the rejections of claims 1–17; and we sustain at least one of the rejections of claims 18–20. Thus, we AFFIRM IN PART.<sup>2</sup>

---

<sup>1</sup> The Appellant is the “applicant” (e.g., “the inventor or all of the joint inventors”) as defined in 37 C.F.R. § 1.42. “The real party in interest is Hussmann Corporation.” (Appeal Br. 2.)

<sup>2</sup> We have jurisdiction over this appeal under 35 U.S.C. § 134(a) and 35 U.S.C. § 6(b).

## STATEMENT OF CASE

“The present invention relates to refrigerated merchandisers, and more particularly to doors for refrigerated merchandisers.” (Spec. ¶ 2.)

### *Illustrative Claim*

1. A door for a refrigerated merchandiser including a case defining a product display area, the door comprising:

a frame;

a first glass pane coupled to the frame and having heat-absorbing glass, the first glass pane configured to be positioned adjacent an ambient environment surrounding the refrigerated merchandiser to absorb radiation from the ambient environment;

a second glass pane coupled to the frame and configured to be positioned adjacent the product display area, the second glass pane having a conductive coating; and

a third glass pane positioned between and spaced from the first glass pane and the second glass pane, the third glass pane having a low emissivity coating.

### *Evidence*

Brown	US 2,444,976	issued July 13, 1948
Roche	US 6,401,399 B1	issued June 11, 2002
Artwohl	US 2006/0103269 A1	published May 18, 2006
Roche152	US 2010/0062152 A1	published May 11, 2010
Reichert	US 2011/0100044 A1	published May 5, 2011
Declaration	Craig S. Reichert	signed September 27, 2017 <sup>3</sup>

---

<sup>3</sup> “This application is a continuation of U.S. Patent Application 13/186,623, filed July 20, 2011, which was before the Board as Appeal No. 2015-001902.” (Appeal Br. 3.) We note the Declaration was filed after this earlier appeal was decided, and thus the Declaration was not evidence weighed when reaching our earlier decision.

*Rejections*

I. The Examiner rejects claims 1, 2, 4, 6–8, 11, 12, 14, 16, and 18–20 under 35 U.S.C. § 103 as unpatentable over Reichert and Brown. (Final Action 2.)

II. The Examiner rejects claims 3, 5, 9, 10, 13, 15, and 17 under 35 U.S.C. § 103 as unpatentable over Reichert, Brown, and Roche<sup>152</sup>. (Final Action 7.)

III. The Examiner rejects claims 1–20 under 35 U.S.C. § 103 as unpatentable over Roche and Artwohl. (Final Action 10.)

ANALYSIS

Claims 1, 11, and 18 are the independent claims on appeal, with the rest of the appealed claims depending therefrom. (*See* Appeal Br., Claims App.) Independent claim 1 sets forth “[a] door for a refrigerated merchandiser,” independent claim 11 sets forth “[a] refrigerated merchandiser” comprising a “door,” and independent claim 18 recites “[a] method of preventing condensation on a door of a refrigerated merchandiser.” (*Id.*)<sup>4</sup> The door includes a “first glass pane” that is positioned, or is configured to be positioned, adjacent to the “ambient environment.” (*Id.*)

Independent claims 1 and 11 require the first glass pane to “hav[e] heat-absorbing glass,” and independent claim 18 requires the step of “absorbing radiation from the ambient environment and incident on the first glass pane.” (Appeal Br., Claims App.)

---

<sup>4</sup> According to the Appellant, “[r]efrigerated merchandisers are used by grocers to store and display food items in a product display area that must be kept at a predetermined temperature.” (Spec. ¶ 3.)

*Rejections I and II*

The Examiner rejects claims 1–20 as being obvious over Reichert and Brown, alone, or further in view of Roche152. (*See* Final Action 2, 7.)

When “a structure already known in the prior art [] is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result” in order to be considered nonobvious. (*KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007).) However, “rejections 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.” (*Id.* at 418.) Thus, such a simple-substitution rationale must be underpinned by a factual finding that a person of ordinary skill in the art would have recognized that the proposed substitution would yield a predictable result. And the record must contain sufficient evidentiary support for this finding of fact.

The Examiner’s rejections rely upon a determination that it would have been obvious “to modify the door of Reichert by substituting [a] glass pane that absorbs radiation as taught by Brown.” (Final Action 3.) Thus, the Examiner articulates a simple-substitution rationale for the proposed combination of Reichert and Brown. And the Examiner underpins this articulated rationale with a factual finding regarding the result yielded by the proposed substitution. (*See id.*)

Specifically, the Examiner finds that a person of ordinary skill in the art would have inferred that the proposed substitution would “reduce the amount of heat transmitted through the system, thus maintaining the device cooler by absorbing radiant heat while having a relatively high light

transmission.” (Final Action 3.)<sup>5</sup> Brown provides evidence that, when a heat-absorbing glass pane is installed in an airplane’s window, this keeps the airplane “cooler while flying by absorbing radiant heat.” (Brown 1:26–30.) According to the Examiner, a person of ordinary skill in the art would infer that a “similar effect” would occur if the heat-absorbing glass pane was instead installed in the door of a refrigerated merchandiser. (Answer 4.)

The Appellant seems to argue that, because Brown “is in the field of aviation,” one of ordinary skill in the art would not consider a glass pane disclosed thereby to be a suitable/predictable substitute for a glass pane in a refrigerator door. (*See e.g.*, Appeal Br. 8–9.) To the extent that this argument is being made, it is not persuasive. We agree with the Examiner that a circumstance could certainly arise in which a person of ordinary skill in the art would correctly infer that a glass pane used in an aircraft window is a suitable, and predictable, substitute for a glass pane in a refrigerator door. (*See e.g.*, Answer 3–5.)

However, in the circumstance at hand, the proposed substitute is a heat-absorbing glass pane, and the Appellant provides declaratory evidence that a person of ordinary skill in the art would not consider such a glass pane to be a suitable/predictable substitute for a glass pane in a refrigerator door. Specifically, the Declaration explains why, prior to the Appellant’s invention, one of ordinary skill in the art would have “considered it undesirable to add heat to any of the glass panels in an uncontrolled manner,

---

<sup>5</sup> The Examiner “need not seek out precise teachings directed to the specific subject matter of the challenged claim[]” as “the inferences and creative steps that a person of ordinary skill in the art would employ” can be taken into account. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).)

because this added heat could result in high internal temperatures and greater refrigeration costs.” (Declaration ¶ 8.)<sup>6</sup>

The Examiner maintains that the Appellant’s declaratory evidence is “opinion” and, therefore, not entitled to any evidentiary weight. (Final Action 21.) Insofar as the Examiner is saying that a declarant’s stance on the ultimate patentability of a claim does not tilt the evidence scale one way or the other, we agree. (See *In re Chilowsky*, 306 F.2d 908, 916 (CCPA 1962).) But “some weight ought to given to a persuasively supported statement of one skilled in the art on what was not obvious to him.” (*In re Lindell*, 385 F.2d 453, 456 (CCPA 1967).) Inasmuch as the Appellant’s evidence might be outweighed by opposing evidence on the record, the Examiner makes no attempt to do so.<sup>7</sup>

Thus, based on the record before us, we do not sustain the Examiner’s rejection of claims 1, 2, 4, 6–8, 11, 12, 14, 16, and 18–20 as obvious over Reichert and Brown; and we do not sustain the Examiner’s rejection of claims 3, 5, 9, 10, 13, 15, and 17 as obvious over Reichert, Brown, and Roche152.

### *Rejection III*

The Examiner rejects claims 1–20 as being obvious over Roche and Artwohl. (See Final Action 10.)

---

<sup>6</sup> There seems to be no dispute that the Declaration qualifies the declarant as “a person of at least ordinary skill in the art of merchandiser design and construction.” (Declaration ¶ 1.)

<sup>7</sup> The Examiner maintains that the Appellant’s Declaration does not establish “skepticism by experts.” (Answer 21.) However such skepticism is not necessary to call into question whether the Examiner’s factual finding regarding predictability is sufficiently supported by the record.

A rejection on obvious grounds cannot be sustained when a proposed combination of the prior art, “even if supported by a motivation to combine,” does not possess all of the elements required by a claim. (*CFMT, Inc. v. Yieldup Int’l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003).) Thus, when a claimed element has an explicit definition set forth in the specification, the proposed combination of the prior art must possess an element satisfying this definition. (See e.g., *Toro Co. v. White Consolidated Industries Inc.*, 199 F.3d 1295, 1301 (Fed. Cir. 1999).)

As for claims 1–17, this rejection relies upon a determination that Artwohl teaches a glass pane having “heat absorbing glass” as required by the claim language. (Final Action 11.) The Examiner maintains that there is “no requirement in the claims language” that the heat absorbing glass be “specifically constructed” and/or “include[] glass containing quantities of ferrous iron or other material selected.” (Answer 12.) However, the Specification explicitly defines the claim term “heat absorbing glass” in this manner. (Spec. ¶ 18.) And the Examiner does not maintain that Artwohl teaches a glass pane satisfying this definition. Indeed, in Artwohl, heat absorption is accomplished by applying a “low emissivity soft coating” to the surface of a glass pane. (Artwohl ¶ 25.)

As for claims 18–20, they rely upon a determination that Artwohl teaches the heat absorbing step (“absorbing radiation from the ambient environment and incident on the first glass pane”) required by the claim language. The Appellant argues Artwohl “does not teach or suggest using a glass pane to absorb radiation from the ambient environment.” (Appeal Br. 14.) However, the Appellant does not adequately address why Artwohl fails to perform this step (albeit without specifically-constructed glass) when

Artwohl prevents condensation on a glass pane’s surface by “capturing the transmission of such non-visible wavelengths.” (Artwohl ¶ 20.)

Thus, in light of the record before us, we do not sustain the Examiner’s rejection of claims 1–17 as obvious over Roche and Artwohl, but we do sustain the Examiner’s rejection of claims 18–20 as obvious over Roche and Artwohl.

### CONCLUSION

<b>Claims Rejected</b>	<b>35 U. S. C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 2, 4, 6–8, 11, 12, 14, 16, 18–20	103	Reichert, Brown		1, 2, 4, 6–8, 11, 12, 14, 16, 18–20
3, 5, 9, 10, 13, 15, 17	103	Reichert, Brown, Roche152		3, 5, 9, 10, 13, 15, 17
1–20	103	Roche, Artwohl	18–20	1–17
<b>Overall Outcome</b>			18–20	1–17

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)(iv).

AFFIRMED IN PART