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Fitch, Even, Tabin & Flannery, LLP 120 South LaSalle Street Suite 2100 Chicago, IL 60603-3406			MCCLAIN-COLEMAN, TYNESHA L.	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANTHONY WILLIAM CRIEZIS,
BRUCE EDWARD CAMPBELL, LISA ANN DIERBACH,
JENNIFER LOUISE KIMMEL,
TIMOTHY DAVID KNIGHT, and JOSEPH MICHAEL SCHUERMAN

Appeal 2019–003057
Application 13/570,860
Technology Center 1700

Before JEFFREY B. ROBERTSON, N. WHITNEY WILSON, and BRIAN
D. RANGE, *Administrative Patent Judges*.

RANGE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant appeals from the
Examiner’s decision to reject claims 11–16, 18–20, and 34–40.¹ We have
jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37
C.F.R. § 1.42. Appellant identifies the real party in interest as Koninklijke
Douwe Egberts B.V. which is a subsidiary of Jacobs Douwe Egberts which
is co-owned by Mondelez International and Acorn Holdings B.V. Appeal Br.
3. Appellant also states that Acorn Holdings B.V. is a subsidiary of JAB
Holdings Company. *Id.*

CLAIMED SUBJECT MATTER²

Appellant describes the invention as relating to a method of making a concentrated dairy liquid (e.g., concentrated milk). Spec. ¶¶ 2, 9. Claim 1 is illustrative:

11. A method of making a concentrated dairy liquid, the method comprising:
 - pasteurizing a dairy cream;
 - concentrating the pasteurized cream to obtain a concentrated cream retentate;
 - homogenizing the concentrated cream retentate to form a homogenized cream;
 - adding a blend of dairy minerals to the homogenized cream retentate;
 - heating the homogenized cream retentate including the blend of dairy minerals to obtain a concentrated dairy liquid having a F_0 value of at least 5, the concentrated dairy liquid having a protein to fat ratio of from about 0.04 to about 0.1 and lactose in an amount of up to 1.5 percent,
 - wherein the dairy minerals are included in an amount effective to provide at least two of the following mineral to protein ratios in the concentrated dairy liquid:
 - about 0.017 mg to about 0.0264 mg potassium per mg protein;
 - about 0.008 mg to about 0.0226 mg magnesium per mg protein;
 - about 0.122 mg to about 0.3516 mg calcium mg per mg protein; and
 - about 0.199 mg to about 0.5394 mg phosphate per mg protein.

² In this Decision, we refer to the Final Office Action mailed April 5, 2018 (“Final Act.”); the Appeal Brief filed September 5, 2018 (“Appeal Br.”); the Examiner’s Answer mailed January 8, 2019 (“Ans.”); and the Reply Brief filed March 8, 2019 (“Reply Br.”).

Independent claim 40 recites mineral to protein ratios similar to those of claim 1.

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

<u>Name</u>	<u>Reference</u>	<u>Date</u>
Germann	US 1,912,073	May 30, 1933
Ward et al. ("Ward")	US 2003/0165574 A1	Sept. 4, 2003
Kimmel et al. ("Kimmel")	US 2010/0104711 A1	Apr. 29, 2010
Van Pelt et al. ("Van Pelt")	AU 20107.76	June 8, 1978
Kurokawa	EP 2 263 471 A1	Dec. 22, 2010

REJECTIONS

The Examiner maintains the following rejections on appeal:

- A. Claims 11, 14–16, 18–20, 34–37, 39, and 40 under 35 U.S.C. § 103 as obvious over Germann in view of Kimmel and Ward. Ans. 4–9.
- B. Claims 12 and 13 under 35 U.S.C. § 103 as obvious over Germann, Kimmel, Ward and further in view of Pleysier. *Id.* at 9–10.
- C. Claim 38 under 35 U.S.C. § 103 as obvious over Germann in view of Kimmel and Ward and further in view of Kurokawa. *Id.* at 10–11.

OPINION

The Examiner has the initial burden of establishing a prima facie case of obviousness under 35 U.S.C. § 103. *See In re Oetiker*, 977 F.2d 1443,

1445 (Fed. Cir. 1992) (“[T]he [E]xaminer bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.”). To establish a *prima facie* case of obviousness, the Examiner must show that each and every limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art or the inferences and creative steps a person of ordinary skill in the art would have employed. *See In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988); *see also KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007). To resolve the issues before us on appeal, we focus on the Examiner’s findings and determinations that relate to the error Appellant identifies.

The Examiner rejects independent claims 11 and 40 as obvious over Germann, Kimmel, and Ward. Ans. 4. The Examiner finds that Ward teaches mineral ranges that overlap with the range claims 11 and 40 recite. Ans. 18. The Examiner also explains that the art teaches reasons to vary mineral content such that it would have been obvious to “select any portions of the disclosed ranges, including the instantly claimed ranges of dairy minerals from the ranges disclosed in the prior art references.” *Id.* at 7; *see also id.* at 19.

Appellant argues that none of the cited references teach at least two of the mineral to protein ratios recited by claims 11 and 40. Appeal Br. 14, 23 (incorporating arguments for claim 11 when addressing claim 40). In particular, Appellant argues that the Examiner calculates the amount of each mineral based on weight of the final product rather than based on the amount of protein in the final product to determine mineral to protein ratios. *Id.* at 15–16.

Appellant’s argument identifies error. The Examiner relies on Ward as teaching mineral ratios and calculates, for example, potassium percentage by multiplying the percent of potassium in the supplement (0–5% (Ward ¶ 18, Table 1)) by the percent of supplement in the beverage (1.48% (*id.* ¶ 34)). Ans. 6. The result of the calculation, however, only provides a range for amount of potassium in the beverage by weight. The Examiner does not calculate how much protein is in the beverage or whether the ratio of potassium to protein overlaps claim 11 and 40’s recited ranges.

Appellant provides an alternative calculation of Ward’s mineral to protein ratio and argues that, according to Appellant’s calculation, only Ward’s magnesium range overlaps with claim 11 and 40’s recited ranges. Appeal Br. 15–16; *see also* Reply Br. 3–4. The Examiner states that Appellant’s calculated ranges overlap with those presently claimed. Ans. 18. The Examiner’s position is not supported by the evidence because, according to Appellant’s calculations, the ranges prior ranges overlap with the claim 11 and 40 ranges for only one out of the four minerals (for magnesium), in contrast to the requirement in claims 11 and 40 that at least two of the minerals be within the recited ranges.

The Examiner’s reliance on Appellant’s calculation also lacks an adequate evidentiary basis because Appellant’s calculation is speculative. Appellant’s calculation is based on Ward Example 1. Appeal Br. 15–16. Appellant calculates a mineral to protein ratio for Ward by dividing an amount of a given mineral (7.38 grams of minerals multiplied by Ward’s percentage for an individual mineral as provided by Ward Table 1) with 30 grams of protein (as in Ward ¶ 36). *Id.* Ward, however, indicates 7.38 grams of minerals (specifically, the TRUCAL mineral formulation) in its

“product.” Ward ¶ 34. Ward then states that an “11-ounce serving” provides 30 grams of protein. *Id.* ¶ 36. We do not know, however, whether the 11 ounce serving necessarily includes the same 7.38 grams of minerals as the “product.” It, therefore, appears based on the present record that neither the Examiner nor the Appellant accurately calculated the prior art’s mineral to protein ratio. This mutual error supports reversal because the Examiner has the burden to establish obviousness in the first instance. *See In re Oetiker*, 977 F.2d at 1445.

We also agree with Appellant that the Examiner has not adequately established that the references recognize mineral to protein ratios—or meeting at least two mineral to protein ratios as recited in claims 11 and 40—as a result-effective variable. Appeal Br. 18–20; *see also* Reply Br. 5. Germann suggests that milk salt balance should be adjusted for sterilization (Germann 3:20–28), and Ward teaches that a milk mineral component should be provided in a “therapeutically effective amount” and that mineral complexes have a “relatively neutral taste.” *See* Ward ¶¶ 11, 16. The Examiner, however, has not adequately explained how these very broad teachings, or the references’ other teachings, would have led a person of skill in the art to reach claim 11 and 40’s recited mineral to protein ratios. Indeed, the Examiner appears to only contend that a person of skill in the art would select dairy minerals “from the ranges disclosed in the prior art references” (Ans. 7), and, as explained above, the Examiner has not adequately established what mineral to protein ratios (if any) the cited references disclose.

Because Appellant’s identify error in the Examiner’s rejection of claims 11 and 40, we do not sustain those rejections. Because the

Examiner’s treatment of dependent claims does not cure this error, we also do not sustain the Examiner’s rejection of the remaining claims on appeal.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
11, 14–16, 18–20, 34–37, 39, 40	103	Germann, Kimmel, Ward		11, 14–16, 18–20, 34–37, 39, 40
12, 13	103	Germann, Kimmel, Ward, Pleysier		12, 13
38	103	Germann, Kimmel, Ward, Kurokawa		38
Overall Outcome				11–16, 18–20, 34–40

REVERSED