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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 2019-003156
Application 14/376,317
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), Appellant¹ appeals from the Examiner's decision to reject claims 32, 33, and 35–37. We have jurisdiction under 35 U.S.C. § 6(b).²

We REVERSE.

CLAIMED SUBJECT MATTER³

Appellant describes the invention as relating to a method of making a concentrated dairy liquid (e.g., concentrated milk). Spec. ¶¶ 2, 9. Claim 32 is illustrative:

32. A concentrated dairy liquid comprising:
 - about 1.3 to about 2.0 percent protein;
 - about 20 to about 30 percent fat;
 - less than about 1.5 percent lactose;
 - about 0.1 to about 1.5 percent added dairy minerals; and
 - about 35 to about 65 percent total solids;wherein the concentrated dairy liquid comprises a ratio of protein to fat of about 0.04 to about 0.1, and
wherein the concentrated dairy liquid has a mineral to protein ratio of at least two of the following:
 - about 0.017 mg to about 0.0264 mg potassium per mg protein;

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. Appeal Br. 3.

² The application that is the subject of this appeal is a continuation-in-part of U.S. Patent Application No. 13/570,860 which is the subject of Appeal No. 2019-003057.

³ In this Decision, we refer to the Final Office Action dated April 5, 2018 (“Final Act.”), the Appeal Brief filed September 5, 2018 (“Appeal Br.”), the Examiner's Answer dated January 8, 2019 (“Ans.”), and the Reply Brief filed March 8, 2019 (“Reply Br.”).

about 0.008 mg to about 0.0226 mg magnesium per mg protein;
about 0.122 mg to about 0.3516 mg calcium per mg protein; and
about 0.199 mg to about 0.5394 mg phosphate per mg protein.

Appeal Br. 25 (Claims App.).

REFERENCES

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

<u>Name</u>	<u>Reference</u>	<u>Date</u>
Hosman	US 1,440,011	Dec. 26, 1922
Ashourian et al. ("Ashourian")	US 2004/0185161 A1	Sept. 23, 2004
Berry et al. ("Berry")	US 2008/0081087 A1	Apr. 3, 2008
Tikanmaki et al. ("Tikanmaki")	US 2010/0055286 A1	Mar. 4, 2010

REJECTIONS

The Examiner maintains the following rejections on appeal:

- A. Claims 32, 33, 35, and 37 under 35 U.S.C. § 103 as obvious over Tikanmaki in view of Hosman and Berry. Ans. 4.
- B. Claim 36 under 35 U.S.C. § 103 as obvious over Tikanmaki in view of Hosman and Berry and further in view of Ashourian. *Id.* at 6.

OPINION

The Examiner has the initial burden of establishing a prima facie case of obviousness 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.”). 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. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988); *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 alleged error Appellant identifies.

Both independent claims on appeal, claims 32 and 37, recite that “the concentrated dairy liquid has a mineral to protein ratio of at least two of the following: 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 per mg protein; and about 0.199 to about 0.5394 mg phosphate per mg protein.” Appeal Br. 25–26 (Claims App.). The Examiner finds that Berry teaches overlapping ratios for magnesium, calcium, and phosphate. Ans. 5.

Appellant argues that the Examiner has not adequately established that Berry teaches or suggests two of the four recited mineral to protein ratios. We agree. The Examiner cites two portions of Berry as support for the rejection. First, the Examiner relies on paragraphs 17 to 26 of Berry. Those paragraphs, however, fails to suggest the recited ratios because they only state minimum amounts of protein, calcium, phosphorous, and magnesium. Appeal Br. 13–14. Appellant provides calculations to support

their argument that if a person of skill in the art were to follow the suggested minimums, none of the recited ratios are reached. *Id.* And, as Appellant argues, Berry addresses only phosphorous content, not phosphate as recited by Appellant's claims. *Id.*

The Examiner does not adequately explain how or why a person of skill in the art would have adjusted calcium and magnesium ratios values above Berry's suggested minimums to the calcium and magnesium values recited in the claims. Moreover, Berry's teaching of minimums, taken literally, presents too many possibilities for such teaching to be considered as teaching ranges that overlap with the mineral to protein ratios of the claims.

Second, the Examiner cites Table 5 (Example 4) of Berry. Ans. 15; Berry ¶ 94. By the Examiner's own calculation, it appears that this Berry example does not have an overlapping mineral to potassium ratio for magnesium, and, again, Berry only teaches inclusion of phosphorus rather than phosphate. Ans. 15; Berry ¶ 94. Appellant emphasizes that this Berry example has 2.51 percent protein—above the maximum 2 percent protein permitted by Appellant's claims. Reply Br. 5–6. We also note that this Berry example also has only 0.6% fat while Appellant's claim requires at least 20% fat. On the present record, the Examiner has not adequately explained why a person of skill in the art would reach two of the Appellant's claims' recited mineral to protein ratios while simultaneously maintaining the constraints imposed by other recitations (for example, total protein and fat content).

Appellant also argues that the cited references do not recognize mineral to protein ratio as a result effective variable. Appeal Br. 15–17. We

do not understand the Examiner's position as presenting a result effective variable theory of obviousness. Rather, the Examiner repeatedly states that it would have been obvious to select portions within the reference's disclosed ranges. Ans. 10, 16. As explained above, however, the Examiner has not adequately established that, based upon Berry (or any other cited references), a person of skill in the art would have reached the recited mineral to protein ratios in an embodiment that also meets the other recitations of Appellant's claims.

We, therefore, do not sustain the Examiner's rejections.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
32, 33, 35, 37	103	Tikanmaki, Hosman Berry		32, 33, 35, 37
36	103	Tikanmaki, Hosman, Berry, Ashourian		36
Overall Outcome				32, 33, 35–37

REVERSED