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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GERALD OLEAN FOUNTAIN and AMY L. PENNER

Appeal 2019-003914
Application 15/102,849
Technology Center 1700

Before JEFFREY W. ABRAHAM, MONTÉ T. SQUIRE, and BRIAN D. RANGE, *Administrative Patent Judges*.

SQUIRE, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Appellant² appeals under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claims 1–12.³ We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

¹ In this Decision, we refer to the Specification filed June 8, 2016 (“Spec.”); Final Office Action dated Apr. 23, 2018 (“Final Act.”); Appeal Brief filed Oct. 5, 2018 (“Appeal Br.”); Examiner’s Answer dated Feb. 19, 2019 (“Ans.”); and Reply Brief filed Apr. 19, 2019 (“Reply Brief”).

² We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Kraft Foods R&D, Inc. as the real party in interest. Appeal Br. 3.

³ Claims 13–15 are withdrawn. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Appellant's claimed subject matter relates to a process for producing a chocolate tablet composition and compositions produced using the method. Spec. 1–2; Abstract. Claim 1, the sole independent claim, illustrates the claimed subject matter on appeal and is reproduced below from the Claims Appendix to the Appeal Brief:

1. A process for the preparation of a chocolate tablet comprising co-milling a dry precursor comprising
 - (i) cocoa nibs and/or particulate cocoa butter and/or particulate cocoa butter equivalent/substitute;
 - (ii) a solid bulk sweetener; and
 - (iii) optionally dairy powder;to obtain a powdered composition having a particle size of <math><10\mu\text{m}</math> (mean) and/or <math><30\mu\text{m}</math> (d90); and
compressing the powdered composition at a pressure of at least 7000kPa to obtain the chocolate tablet.

Appeal Br. 16 (key disputed claim language italicized and bolded).

REFERENCES

The Examiner relies on the following prior art references as evidence in rejecting the claims on appeal:

Name	Reference	Date
Beringer et al. ("Beringer")	US 4,139,589	Feb. 13, 1979
Kopp	EP 1733625 A1	Dec. 20, 2006

Glacier Confection, http://www.glacierconfection.com/Glossary_ep_44.html (archived at archive.org Jan. 9, 2012, last visited Nov. 30, 2017) ("Glacier").

REJECTIONS

On appeal, the Examiner maintains (Ans. 3) the following rejections:

1. Claims 1–11 are rejected under 35 U.S.C. § 103 as being unpatentable over Kopp in view of Beringer (“Rejection 1”). Ans. 4.
2. Claim 12 is rejected under 35 U.S.C. § 103 as being unpatentable over Kopp in view of Beringer as applied to claims 1 and 10 above, and in further view of Glacier (“Rejection 2”). *Id.* at 6–7.

OPINION

Rejection 1

The Examiner rejects claims 1–11 under § 103 as obvious over the combination of Kopp and Beringer (Ans. 4–6), which we refer to as Rejection 1. In response to the Examiner’s rejection, Appellant presents argument for the patentability of claims 1–4, 6–8, 10, and 11 as a group, and presents separate arguments for the patentability of claim 5 and claim 9, respectively, which we address in turn below.

Claims 1–4, 6–8, 10, and 11

Appellant does not present separate argument for the patentability claims 1–4, 6–8, 10, and 11. Appeal Br. 6. We select claim 1 as representative of this group and claims 2–4, 6–8, 10, and 11 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner determines that the combination of Kopp and Beringer suggests a process for preparing a chocolate product satisfying all of the limitations of claim 1, and concludes the combination would have rendered the claim obvious. Ans. 4–6 (citing Kopp ¶¶ 1, 7, 22, 52, 54, 64; Beringer 1:26–33, 1:59–2:5, 4:25–5:17, 5:67–6:5, Fig. 8).

The Examiner finds Kopp teaches or suggests the majority of the limitations of claim 1, but that the reference is silent regarding the “compressing the powdered composition at a pressure of at least 7000kPa to obtain the chocolate tablet” recitation of the claim. *Id.* at 5. The Examiner, however, relies on Beringer for teaching or suggesting that element of the claim. In particular, the Examiner finds Beringer teaches a compression molding method for forming gum encapsulated with a coating, which allows for the encapsulation of gum with a powder by using conventional pelletizing machines. *Id.* at 5 (citing Beringer 1:26–33, 1:59–2:5, 4:25–5:17, Fig. 8).

The Examiner further finds Beringer teaches that the process is carried out at sufficiently high pressure to produce layers with sufficient hardness such that the tablet produced will be strong enough for use. *Id.* at 5 (citing Beringer 5:67–6:5, Fig. 8E).

Based on the above findings, the Examiner concludes

[i]t would have been obvious to one of ordinary skill in the art at the time the invention was filed to have used the method of making an encapsulated gum disclosed by Beringer to form the chocolate confection comprising a filling and molded chocolate powder encapsulant disclosed by Kopp since this method produces the structure disclosed by Kopp and can be performed on conventional pelletizing machines.

Id. at 6. The Examiner further concludes it would have been obvious to one of ordinary skill to have optimized Beringer’s compression pressure in order to obtain an encapsulated confection with sufficient hardness/structural integrity for use. *Id.* at 6.

Appellant argues the Examiner’s rejection should be reversed because Kopp does not teach or suggest the “compressing the powdered composition

at a pressure of at least 7000kPa to obtain the chocolate tablet” recitation of the claim. Appeal Br. 6–11; Reply Br. 1–3. In particular, Appellant contends “Kopp provides no hint or suggestion that the powdered intermediate may be compressed” (Appeal Br. 9) and “no mention is made of compressing the powdered base composition directly to form a tablet” (*id.* at 8). *See also* Reply Br. 1 (“Kopp Does Not Disclose or Suggest Compressing a Powder to Form Chocolate Products.”).

Appellant further argues a person having ordinary skill in the art would not have been led to modify Kopp to form a chocolate tablet directly from Kopp’s powdered precursor. Appeal Br. 6. In particular, Appellant contends

[o]ne of ordinary skill would have had no reason to modify a reference such as Kopp . . . to arrive at process in which ingredients are co-milled and then compressed into a tablet form powder form.

Id. at 11; *see also* Reply Br. 3 (same).

Appellant also argues Beringer does not teach or suggest the use of “chocolate” or “cocoa,” as required by the claims. Appeal Br. 11–13. In particular, Appellant contends that, in contrast to the claimed invention, “[t]here is absolutely no mention of chocolate or cocoa components in any component of Beringer” and Beringer does not “mention confections of any sort aside from referring to a plastic component occasionally as a ‘chewing gum mass.’” *Id.* at 11–12.

Lastly, Appellant argues one of ordinary skill in the art would not have had reason to combine the teachings of Kopp and Beringer to arrive at the claimed invention. Appeal Br. 11; Reply Br. 3–4.

We do not find Appellant’s arguments persuasive of reversible error in the Examiner’s rejection based on the fact-finding and reasoning provided

by the Examiner at pages 4–6 and 7–14 of the Answer and pages 3–5 of the Final Office Action. On the record before us, we find a preponderance of the evidence and sound technical reasoning support the Examiner’s findings and determination that the combination of Kopp and Beringer suggests a process for preparing a chocolate tablet satisfying all of the limitations of claim 1 and conclusion that the combination would have rendered the claim obvious. Kopp ¶¶ 1, 7, 22, 52, 54, 64; Beringer 1:26–33, 1:59–2:5, 4:25–5:17, 5:67–6:5, Fig. 8.

We further find the Examiner provides a reasonable basis, which is supported by a preponderance of the evidence in the record, to evince why one of ordinary skill would have combined the teachings of Kopp and Beringer to arrive at the claimed invention. Ans. 6 (explaining that one of ordinary skill would have had reason to use Beringer’s compression method to form a chocolate confection comprising a filling and molded chocolate encapsulant because the method produces the same structure disclosed by Kopp and can be performed on conventional pelletizing machines); *see also KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007) (explaining that any need or problem known in the art can provide a reason for combining the elements in the manner claimed).

Moreover, as the Examiner finds and explains at pages 8–10 of the Answer, it follows that, because compressing chocolate powders to form molded chocolate products, including tablets, was well-known in the prior art at the time of Appellant’s claimed invention, as evidenced, for example,

by the Weaber,⁴ Pontzer,⁵ and Rumbaut⁶ references, which are of record in this case, it would have been obvious to one of ordinary skill in the art at the time of invention to have utilized a compression molding process to form a chocolate tablet from Kopp's chocolate base powder. *KSR*, 550 U.S. at 416 (“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.”).

Appellant's arguments do not reveal reversible error in the Examiner's factual findings or analysis in this regard.

Appellant's argument that Kopp does not teach or suggest compressing the powdered composition to obtain the chocolate tablet (Appeal Br. 8–9) and Beringer does not teach or suggest the use of chocolate or cocoa (*id.* at 11–12) is not persuasive of reversible error in the Examiner's rejection because Appellant attacks the references individually rather than the combined teachings of the prior art as a whole. One cannot show non-obviousness by attacking references individually where the rejection is based on a combination of references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Appellant's contentions in this regard are misplaced because they are premised on what Appellant contends Kopp and Beringer each teaches individually, and not the combined teachings of the references as a whole and what the combined teachings would have suggested to one of ordinary skill in the art.

⁴ Weaber et al., US 6,309,689 B1, dated Oct. 30, 2001 (“Weaber”).

⁵ Pontzer et al., US 2006/0024411 A1, published Feb. 2, 2006 (“Pontzer”).

⁶ Rumbaut, WO 2009/068999 A2, published June 4, 2009.

As the Examiner finds (Ans. 5, 7) and contrary to what Appellant's argument seems to suggest, the Examiner relies on Beringer for suggesting the "compressing the powdered composition" element of claim 1, while Kopp is relied upon in the rejection for teaching or suggesting the "chocolate" and "cocoa" elements of the claim.

Appellant's contentions that one of ordinary skill in the art would not have been led to modify Kopp to form a chocolate tablet (Appeal Br. 6) and would not have had reason to combine the teachings of Kopp and Beringer to arrive at the claimed invention (Appeal Br. 11) are not persuasive because they are largely conclusory and Appellant does not provide an adequate explanation to support them. *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *see also In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (explaining that mere lawyer's arguments or conclusory statements, which are unsupported by concrete factual evidence, are entitled to little probative value).

Moreover, as previously discussed above and contrary to what Appellant argues, the Examiner provides sufficient reasoning (Ans. 6) well-supported by evidence in the record to explain why one of ordinary skill would have combined the teachings of Kopp and Beringer to arrive at the claimed invention. Appellant's disagreement as to the Examiner's factual findings and reasoning for combining the references, without more, is insufficient to establish reversible error. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[M]ere statements of disagreement . . . as to the existence of factual disputes do not amount to a developed argument.").

We, therefore, sustain the Examiner's rejection of claims 1–4, 6–8, 10, and 11.

Claim 5

Appellant presents a separate argument for the patentability of claim 5.⁷ Appeal Br. 13–14; Reply Br. 6. Claim 5 depends from claim 1 and further recites “wherein the powdered composition is compressed at a pressure of from 40000 to 70000kPa.” Appeal Br. 17 (Claims Appendix).

Appellant argues the Examiner's rejection of claim 5 should be reversed because the cited art does not teach or suggest the recitation “wherein the powdered composition is compressed at a pressure of from 40000 to 70000kPa” and “one of ordinary skill in the art would have had no guidance as to the magnitude of pressure for compression.” Appeal Br. 13; Reply Br. 6.

We do not find Appellant's arguments persuasive of reversible error in the Examiner's rejection based on the Examiner's factual findings and reasoning provided at pages 5–6 and 12–13 of the Answer and pages 4–5 of the Final Office Action. In particular, we find a preponderance of the evidence and sound technical reasoning support the Examiner's determination that it would have been obvious to one of ordinary skill to

⁷ Although Appellant's arguments at page 13 the Appeal Brief and page 6 of the Reply Brief refer to “Claim 7,” we assume this is a typographical error because the arguments actually appear to be directed to claim 5, which includes the recitation “wherein the powdered composition is compressed at a pressure of from 40000 to 70000kPa,” and not to claim 7, which does not include that recitation. *Compare* claim 5 (Appeal Br. 17) *with*, claim 7 (Appeal Br. 17). We, therefore, consider and address Appellant's arguments as relating to claim 5.

have optimized Beringer's compression pressure to arrive at the claimed range in order to obtain an encapsulated confection with sufficient structural integrity/hardness. Beringer 1:26–33, 1:59–2:5, 4:25–5:17, 5:67–6:5, Fig. 8.

As the Examiner explains (Ans. 5), because Beringer teaches that the compressing process is carried out at sufficiently high pressure to produce layers with sufficient hardness such that the tablet produced will be strong enough for use (Beringer 5:67–6:5), it follows that one of ordinary skill would have had reason to compress the powdered composition within the claimed pressure range or would have arrived at the claimed range through routine experimentation in order to obtain a tablet with sufficient structural integrity for use. Beringer 6:2–5 (“The press operation . . . is carried out at a higher intensity so that the total tablet will be strong enough for use”); *see also In re Aller*, 220 F.2d 454, 456 (CCPA 1955) (“[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.”).

In this regard, we observe that the Specification assigns no particular criticality to the pressure range at which the powdered composition is compressed, but rather describes embodiments encompassing very broad pressure ranges and disclosing that “[s]uch pressures provide a tablet which is structurally strong but still soft enough for a consumer to bite into.” Spec. 4:18–25.

We, therefore, sustain the Examiner's rejection of claim 5.

Claim 9

Appellant also presents a separate argument for the patentability of claim 9. Appeal Br. 14; Reply Br. 6–7. Claim 9 depends from claim 1 and further recites “wherein the process additionally comprises a subsequent step

of exposing the chocolate tablet to elevated temperature in order to modify its appearance.” Appeal Br. 17 (Claims Appendix).

Regarding the “wherein the process additionally comprises a subsequent step of exposing the chocolate tablet to elevated temperature in order to modify its appearance” recitation of claim 9, the Examiner relies on the combination of Kopp and Beringer for suggesting that element of the claim. Ans. 6. In particular, the Examiner finds that

when the chocolate tablet produced by the modification of Kopp with Beringer is consumed by a consumer the temperature is necessarily raised above ambient temperatures in the mouth of the consumer and the appearance of the tablet is modified.

Id. at 6.

Appellant argues the Examiner’s rejection of claim 9 should be reversed because, in contrast to the Examiner’s finding, a consumer eating the product is clearly not a step in the process for the preparation of a chocolate tablet, as required by the claim. Appeal Br. 14.

We agree with Appellant’s argument. In particular, on the record before us, we are not persuaded the Examiner has identified sufficient evidence or persuasively explained how or why one of ordinary skill in the art would have considered a consumer ultimately eating the product “a subsequent step of exposing the chocolate tablet to elevated temperature” in the process for the preparation of the chocolate tablet, as recited in the claim. *KSR*, 550 U.S. at 418 (requiring “reasoning with some rational underpinning to support the legal conclusion of obviousness”) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

We, therefore, do not sustain the Examiner’s rejection of claim 9.

Accordingly, with respect to Examiner's § 103 rejection of claims 1–11 as obvious over the combination of Kopp and Beringer, we affirm the rejection of claims 1–8, 10, and 11 and reverse the rejection of claim 9.

Rejection 2

The Examiner rejects claim 12 under § 103 as obvious over the combination of Kopp, Beringer, and Glacier (Ans. 6–7), which we refer to as Rejection 2. Claim 12 depends from claim 10 and further recites “wherein the solid filling is a chocolate having a melting point of 37°C or less.” Appeal Br. 18 (Claims Appendix).

Appellant contends the Examiner's rejection of claim 12 should be reversed because

[t]here is no reason that one of ordinary skill in the art would have been led to include a filling, particularly a chocolate filling, in a pharmaceutical tablet of the type described in Beringer . . . [and] Glacier would have provided one of ordinary skill no guidance or suggestion to include a chocolate filling within a tablet of compressed chocolate powder.

Appeal Br. 15.

We do not find Appellant's contention persuasive of reversible error in the Examiner's rejection because it is conclusory and unsupported by persuasive evidence in the record. *De Blauwe*, 736 F.2d at 705.

Moreover, based on the fact-finding and reasoning provided by the Examiner at pages 7 and 13–14 of the Answer and pages 5–6 of the Final Office Action, we find a preponderance of the evidence and sound technical reasoning support the Examiner's analysis and determination that, in view of the combined teachings of Kopp, Beringer, and Glacier, it would have been obvious to one of ordinary skill to have arrive at the claimed invention.

Kopp ¶¶ 1, 7, 22, 52, 54, 64; Beringer 1:26–33, 1:59–2:5, 4:25–5:17, 5:67–6:5, Fig. 8; Glacier 2.

Contrary to what Appellant contends, the Examiner does provide articulated reasoning with a rational underpinning to explain why one of ordinary skill would have been led to a process “wherein the solid filling is a chocolate having a melting point of 37°C or less,” as recited in claim 12, based on the combined teachings of the cited art. Ans. 7 (explaining it would have been obvious to one of ordinary skill because utilizing such filling “was routine and conventional in the chocolate arts at the time the invention was filed” and “conventional chocolate inherently has a melting point of less than 37°C”).

Indeed, as previously noted above in affirming the Examiner’s rejection of claims 1–4, 6–8, 10, and 11, it is well-settled that the “combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 550 U.S. at 416

Accordingly, we affirm the Examiner’s § 103 rejection of claim 12 as obvious over the combination of Kopp, Beringer, and Glacier.

CONCLUSION

In summary:

Claim(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-11	103	Kopp, Beringer	1-8, 10, 11	9
12	103	Kopp, Beringer, Glacier	12	
Overall Outcome			1-8, 10-12	9

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