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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ALEXANDER VIGNERI

Appeal 2019-004763
Application 14/150,400
Technology Center 1700

Before BEVERLY A. FRANKLIN, N. WHITNEY WILSON, and
JEFFREY R. SNAY, *Administrative Patent Judges*.

WILSON, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner’s November 16, 2017 decision finally rejecting claims 1, 3, 6, 7, 9–14, 18–20, and 28 (“Final Act.”). We have jurisdiction over the appeal 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. Appellant identifies Alexander Vigneri, who is also the named inventor as the real party in interest (Appeal Br. 4).

CLAIMED SUBJECT MATTER

Appellant's disclosure generally relates to chocolate confection with a coated surface having a coarse sugar coating, formed from one or more layers of a first solution having a first sugar to water ratio, and a finish sugar coating applied over the coarse sugar coating and formed from one or more layers of a second solution having a second sugar to water ratio (Abstract). The first sugar to water ratio is less than half water by weight, and the second sugar to water ratio is more than half water by weight (*id.*). The application also has claims directed to a method of making such a chocolate confection. Details of the claimed method are set forth in representative claim 9, which is reproduced below from the Claims Appendix to the Appeal Brief:

9. A method for coating a chocolate confection, the method comprising:
 - forming a chocolate confection having a hollow center;
 - sealing the surface of the chocolate confection with a binding agent;
 - cooling a first coating solution from near boiling to about 70 degrees Fahrenheit, wherein the weight of sugar exceeds the weight of water in the first coating solution;
 - applying the first coating solution to the sealed surface in one or more rough sugar layers;
 - applying a second, finish coating sugar solution over the rough sugar layers on the surface in one or more layers, the finish coating sugar solution having a sugar to water ratio wherein the weight of the water exceeds the weight of the sugar, the finish coating sugar solution forming a finish sugar coating having a plurality of visible pores having a pore depth in a size range of 0.02 to 0.3 millimeters; and
 - air-drying the coated chocolate confection.

REJECTIONS

1. Claims 1, 3, 6, and 19 are rejected under 35 U.S.C. § 103(a) as unpatentable over Groves² in view of Bogusz³ and Beacon Hens Eggs,⁴ as evidenced by Lee.⁵

2. Claim 7 is rejected under 35 U.S.C. §103(a) as unpatentable over Groves, Bogusz and Beacon Hens Eggs, in view of Lee.

3. Claims 9, 11–13, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, Bogusz and Lee.

4. Claim 10 is rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, Bogusz and Lee, and further in view of Bunick.⁶

5. Claim 14 is rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, of Bogusz and Lee, in view of Naor⁷ and Baydo.⁸

6. Claim 18 is rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, Bogusz and Lee, in view of CCC.⁹

² Groves, “Problem Solving in Resolving Pan Processing,” *32nd P.M.C.A. Production Conference* (1978).

³ Bogusz, “Sucrose Hard Panning,” *58th P.M.C.A. Production Conference* (2004).

⁴ Beacon Hens Eggs, printed from <http://ingridcreates.com/how-to-paint-candy-coated-chocolate-easter-eggs/> (last accessed 3/23/2015).

⁵ Lee et al., US 6,406,732 B1, issued June 18, 2002.

⁶ Bunick et al., US 2004/0170750 A1, published September 2, 2004.

⁷ Naor et al., US 6,299,374 B1, issued October 9, 2001.

⁸ Baydo et al., US 7,842,319 B2, issued November 30, 2010.

⁹ Chocolate, Cocoa, and Confectionary: Science and Technology Third Edition, p. 506.

7. Claim 25 is rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, Bogusz and Lee, in view of Song.¹⁰

8. Claim 28 is rejected under 35 U.S.C. § 103(a) as unpatentable over Groves, Bogusz and Lee, in view of Brandt.¹¹

The Examiner withdrew the rejections of claims 25 and 28 under 35 U.S.C. §112, first paragraph (Ans. 3–4)

DISCUSSION

Appellant generally argues all of the claims together, relying on the same arguments for each independent claim (*see*, Appeal Br. 20, 22), and does not argue the dependent claims separately (*see*, Appeal Br. 19, 20–21). Accordingly, we focus our analysis on the rejection of representative claim 9 over Groves in view of Bogusz and Lee. This analysis will be applicable to the rejection of the remaining claims. Appellant does make an additional argument in connection with independent claim 28 (Appeal Br. 22–23). This argument will be addressed separately.

The Examiner finds that Groves teaches a method of coating chocolate confections using a hard panning method, which entails the application of a mixture of sugar and water to the confection where the sugar crystalizes on the confection (Final Act. 6, citing Groves, p. 64, col. 1). The Examiner further finds that Groves discloses two distinct stages within the coating process: (1) a first stage, called the building-up stage, where the

¹⁰ Song et al., US 2006/0198924 A1, published September 7, 2006.

¹¹ Brandt, Jr. et al., US 2009/0092752 A1, published April 9, 2009.

water/sugar mixture contains 60-65% sugar and is dried with warm air or heat to form a coating with rough crystals; and (2) a second stage in which the water/sugar mixture has “approximately 50%” sugar and less heat is used to form finer crystals for a finish coating (*id.*); *see* Groves 64 (“The smooth finish is achieved by ‘weakening’ the syrup, to 50–55% solids, and by using less heat.”). The Examiner finds that Groves does not explicitly teach that in the second stage “the weight of the water exceeds the weight of the sugar” (i.e. the weight ratio of water to sugar is more than 50%) (Final Act. 6). The Examiner also finds that because the process described by Grove is similar to the claimed process, it would be expected that the claimed properties regarding pore depth would be produced, unless Appellant could otherwise demonstrate that it would be different (Final Act. 7, citing *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977)).

Finally, the Examiner finds that Groves does not disclose that the first coating solution is cooled from near boiling to about 70°F prior to applying it to the surface (Final Act. 8). However, the Examiner finds that Bogusz also discloses a hard panning process, similar to that of Groves, and indicates that the water syrup mixture should be used “at temperatures up to 150°F, as long as the centers will not melt or deform” (Final Act. 8, citing Bogusz, p. 32, col. 1). The Examiner determines that it would have been obvious to cool the water/sugar mixture of Groves to a temperature so that it does not melt or deform the chocolate center, and that the claimed temperature of 70°F is within the broad range disclosed by Bogusz (up to 150°F) (Final Act. 8–9).

Based on our review of the arguments and evidence supplied by Appellant, we conclude that Appellant has not demonstrated reversible error

in the rejections, essentially for the reasons articulated by the Examiner in the Final Action and the Answer. We add the following for emphasis.

With regards to the water/sugar ratio in the second coating solution, Appellant contends that Groves does not teach the requirement that the weight of the water exceeds the weight of the sugar, because Groves states that its second solution is from 50-55% solids, and even a 50:50 sugar/water mixture (the lowest amount specifically disclosed by Groves) would not meet the claimed ratio (Appeal Br. 9). This argument is not persuasive.

As noted by the Examiner (Ans. 27), the claim language covers a second coating solution with a water content of 50.01%, because in that case the weight of the water would exceed the weight the sugar. The bottom weight percentage given by Groves is listed as “50%” (and not for example, 50.00%), and reasonably would have been understood by a person of skill in the art as encompassing a solution containing 49.9% sugar (and hence 50.1% water) as these concentrations likely would have been reported as containing 50% water. Thus, the disclosure in Groves of a 50% sugar solution overlaps with the claimed sugar range. Moreover, even if it were determined that the ranges do not specifically overlap, our reviewing court has held that “[a] prima facie case of obviousness exists where the claimed ranges or amounts do not overlap with the prior art but are merely close.” *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 783 (Fed. Cir. 1985). Finally, Appellant has provided no arguments or evidence to show that the use of just over 50% water would provide materially different results than the use of a 50% water solution.

Accordingly, we conclude that this argument does not demonstrate reversible error in the rejection.

With regards to the temperature limitation, Appellant contends it would not have been obvious to cool the solution of Groves to 70°F (Appeal Br. 13). The Examiner relies on the statement in Bogusz that “[i]t is best to add engrossing syrup at temperatures up to 150°F, as long as the centers will not melt or deform” as teaching a range of temperatures which includes the claimed 70°F.

Appellant argues (Appeal Br. 14–15) that Bogusz suggests that warmer temperatures are preferred (“temperatures up to 150°F, *as long as the centers will not melt or deform*”), and also indicates that temperatures below 86°F (which is below the melting point of chocolate) would not be produce “acceptable syrup distributions.” In particular, Bogusz states that the viscosity of the coating solution (“engrossing syrup”) should be less than 200 cps, and shows that a 67% sucrose solution has a viscosity of 77 cps (Bogusz, p. 32, Fig. 3). Appellant asserts that “a 67% sugar solution, as encouraged by the [Bogusz] reference, has a viscosity greater than 200 cps at about 70°F” and, therefore, a person of skill in the art reading Bogusz would not be led to cooling down the solution of Groves to 70°F (Appeal Br. 15).

This argument is not persuasive. First, Appellant has only provided attorney argument, not evidence, in support of the claim that a 67% sucrose solution would have a viscosity of greater than 200 cps. Thus, this argument is entitled to little weight. Moreover, Groves teaches that its first coating solution should have from 60-65% sugar, so that the viscosity of a 67% sucrose solution is of limited probative value.

We agree with the Examiner that the plain language of Bogusz teaches that the temperature of the coating solution can be from 0-150°F (i.e.

“up to 150°F”), and that Bogusz teaches that it should not be so warm as to melt the chocolate. Since chocolate is said to be known to melt at temperatures in the 95-100°F range (Appeal Br. 14), using a temperature of 70°F would be expected to work for these purposes, and a person of skill in the art would be expected to optimize the temperature for best results. *See Bogusz* 32 (identifying temperature as one of “several additional factors [that] play a role in the uniformity of spreading.”).

Appellant has not provided specific evidence to show that the use of a 70°F temperature has *unexpected* results relative to warmer temperatures. Accordingly, we agree with the Examiner that a person of skill in the art would have had a reason to run the process of Groves using the first solution at 70°F with a reasonable expectation of success.

Finally with respect to the pore size limitations, we agree with the Examiner that because the method steps would have been obvious over the prior art, the burden shifts to Appellant to demonstrate that following those steps would not have resulted in a product with the claimed pore sizes. Appellant does not meet that burden.

Accordingly, we conclude that the preponderance of the evidence of record supports the rejections, which we therefore affirm.

With regards to claim 28, Appellant argues that the Examiner improperly relied on the teachings of Brandt because Brandt discloses a spiral tumbler, not a panning drum (Appeal Br. 23). This argument is not persuasive because, as explained by the Examiner (Ans. 41), both the spiral tumbler of Brandt and the panning drum of Groves are used to coat edible centers with syrup during a tumbling process. Thus, a person of skill in the

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art would have been motivated to use Brandt's rotation speed in the panning drum of Groves as it was known that this rotation speed was effective.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1, 3, 6, 19	103(a)	Groves, Bogusz, Beacon Hens Egg, Lee	1, 3, 6, 19	
7	103(a)	Groves, Bogusz, Beacon Hens Egg, Lee	7	
9, 11–13, 20	103(a)	Groves, Bogusz, Lee	9, 11–13, 20	
10	103(a)	Groves, Bogusz, Lee, Bunick	10	
14	103(a)	Groves, Bogusz, Lee, Naor, Baydo	14	
18	103(a)	Groves, Bogusz, Lee, CCC	18	
25	103(a)	Groves, Bogusz, Lee, Song	25	
28	103(a)	Groves, Bogusz, Lee, Brandt	28	
Overall Outcome			1, 3, 6, 7, 9–14, 18–20, and 28	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED