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THE PROCTER & GAMBLE COMPANY GLOBAL IP SERVICES CENTRAL BUILDING, C9 ONE PROCTER AND GAMBLE PLAZA CINCINNATI, OH 45202			RONEY, CELESTE A	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JITEN ODHAVJI DIHORA, MARC ADAM FLICKINGER
JIANJUN JUSTIN LI, and JOHAN SMETS¹

Appeal 2020-000167
Application 15/198,248
Technology Center 1600

Before ERIC B. GRIMES, LINDA M. GAUDETTE, and
FRANCISCO C. PRATS, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) involving claims to a method of making a consumer product, which have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ Appellant identifies the real party in interest as The Procter & Gamble Company. Appeal Br. 1. We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42.

STATEMENT OF THE CASE

“The use of multiple distinct populations of microcapsules, each with a distinct bloom pattern, may be used to overcome the habituation experienced by some consumers to a fragrance present in an article and/or composition.” Spec. 3:23–25. The Specification states that “including populations of microcapsules with different fracture strength profiles may deliver multiple blooms.” *Id.* at 3:20–22.

The Specification discloses that “the amount of the partitioning modifier relative to the perfume oil may . . . influence the fracture strength of the microcapsule.” *Id.* at 5:3–5. A “partitioning modifier promotes shell formation.” *Id.* at 4:18–19.

“[T]he size of the microcapsule may also impact the fracture strength of the microcapsule.” *Id.* at 5:10–11. “The microcapsules may have a median volume-weighted particle size of from 2 microns to 80 microns, from 10 microns to 30 microns, or from 10 microns to 20 microns.” *Id.* at 10:13–14.

Claims 1–5, 7–16, and 18–24 are on appeal. Claim 1, reproduced below, is illustrative (emphasis added):

1. A method of making a consumer product that provides multiple blooms of fragrance, the method comprising:
 - combining a first adjunct material, a first population of microcapsules, and a second population of microcapsules to form the consumer product;
 - wherein the first population has a first median volume weighted particle size and comprises microcapsules comprising a partitioning modifier and a first perfume oil at a first weight ratio; and

wherein the second population of microcapsules has a second median volume weighted particle size and comprises microcapsules comprising the partitioning modifier and a second perfume oil at a second weight ratio;

wherein the first median volume weighted particle size and the second median volume weighted particle size are different.

The claims stand rejected as follows:

Claims 1–5, 7–16, and 18–23 under 35 U.S.C. § 103 as obvious based on Reymar² (Ans. 3) and

Claim 24 under 35 U.S.C. § 103 as obvious based on Reymar and Clauss³ (Ans. 6).

OPINION

Claims 1–5, 7–16, and 18–23 stand rejected as obvious based on Reymar. The Examiner finds that Reymar teaches “multi-capsule compositions comprising a first and a second capsule (particle), . . . particle sizes from 1 to 15 microns . . . partitioning modifiers including mineral oil and IPM [isopropyl myristate] . . . , perfume oils and percentages thereof.” Ans. 4. The Examiner finds that Reymar “do[es] not explicitly disclose an example wherein the claimed components, at the claimed percentages are combined into a single composition.” *Id.* The Examiner concludes, however, that it would have been obvious “to select each component and combine

² US 2015/0132377 A1, published May 14, 2015.

³ US 4,898,680, issued February 6, 1990.

them as instantly claimed, because Reymar et al. suggest that the instant components can be combined or mixed together.” *Id.* at 5.

Appellant argues that

Reymar et al. does not disclose or suggest compositions comprising two populations of microcapsules wherein the median volume weighted particle sizes of the two populations of microcapsules are different. Indeed, Reymar et al. does not disclose or suggest anything about the median volume weighted particle size of its microcapsules.

Appeal Br. 3.

In response, the Examiner points out that “Reymar taught, at [0049], that the diameter of any of the disclosed microcapsules or particles varied from about 10 nanometers to about 1,000 microns. As per Reymar, the microcapsule distribution was narrow, broad or multi-modal.” Ans. 8. The Examiner reasons that, “[a]lthough Reymar did not disclose the word ‘median,’ Reymar’s disclosure (e.g., narrow, broad or multi-modal distributions of particles/capsules having diameters of 10 nanometers to 1,000 microns) guides an ordinarily skilled artisan to determine a median particle size.” *Id.*

The Examiner also “responds that Reymar is not required to disclose a median volume weighted particle size. . . . It is reasonable to conclude that an ordinarily skilled artisan would be able to determine median particle sizes, and different median particle sizes, where size ranges of 10 nanometers to about 1,000 microns were disclosed.” *Id.* at 8–9.

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or

argument shift to the applicant.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). A proper § 103 analysis requires “a searching comparison of the claimed invention—including all its limitations—with the teaching of the prior art.” *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995).

In this case, we conclude that the Examiner has not shown that a method meeting all of the limitations of claim 1 would have been obvious based on Reymar, which teaches a “capsule delivery system” that comprises first and second capsules containing first and second active materials, respectively. Reymar ¶ 6. “The first and second capsules differ in their wall materials, amounts of wall materials, ratios of wall materials, core modifiers, scavengers, active materials, curing temperatures, heating rates, curing times, or a combination thereof.” *Id.*

Reymar states that “[t]he diameter of any of the microcapsules or particles described above can vary from about 10 nanometers to about 1000 microns.” *Id.* ¶ 49. “The microcapsule distribution can be narrow, broad, or multi-modal. Each modal of the multi-modal distributions may be composed of different types of microcapsule chemistries.” *Id.*

Thus, Reymar at best suggests a “multi-modal” size distribution for the microcapsules in its composition. The Examiner has not provided evidence or sound technical reasoning to show that a multi-modal size distribution of microcapsules necessarily includes two populations that have different median volume weighted particle sizes.

The Examiner also has not persuasively shown that a person of ordinary skill in the art would have had a reason, based on the description of a multi-modal size distribution of microcapsules, to make a composition

comprising two populations of microcapsules, where each population has a different median volume weighted particle size. “[R]ejections 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.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

We conclude that the Examiner has not met the initial burden of showing prima facie obviousness. We therefore reverse the rejection of claims 1–5, 7–16, and 18–23 under 35 U.S.C. § 103 based on Reymar. For the same reason, we reverse the rejection of claim 24 based on Reymar and Clauss.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–5, 7–16, 18–23	103	Reymar		1–5, 7–16, 18–23
24	103	Reymar, Clauss		24
Overall Outcome				1–5, 7–16, 18–24

REVERSED