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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/119,935	02/24/2014	Cesar C. Elejalde	CDS0380US3	2613
23413	7590	11/21/2019	EXAMINER	
CANTOR COLBURN LLP			DEES, NIKKI H	
20 Church Street			ART UNIT	
22nd Floor			PAPER NUMBER	
Hartford, CT 06103			1791	
			NOTIFICATION DATE	
			DELIVERY MODE	
			11/21/2019	
			ELECTRONIC	

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* CESAR C. ELEJALDE,  
MILES VAN NIEKERK, and GERALD B. COTTEN

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Appeal 2019-003528  
Application 14/119,935  
Technology Center 1700

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BEFORE GEORGE C. BEST, ELIZABETH M. ROESEL, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

ROESEL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 22 and 24–43. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Intercontinental Great Brands LLC. Appeal Br. 2.

### CLAIMED SUBJECT MATTER

The claims are directed to a method for continuously coating individual pieces of confectionery product. Claim 22, reproduced below, is illustrative of the claimed subject matter:

22. A method for continuously coating individual pieces of confectionery product, the method comprising:
- feeding the individual pieces of confectionery product from a product feed device into at least one drum coating arrangement, said drum coating arrangement including a first rotating drum and a second rotating drum;
  - transporting the individual pieces of confectionery product through a first drum volume defined by said first rotating drum, said transporting through said first drum volume occurring in a first residence time;
  - applying a liquid material to the individual pieces of confectionery product during said first residence time;
  - transferring the individual pieces of confectionery product from said first drum volume to a second drum volume defined by said second rotating drum;
  - transporting the individual pieces of confectionery product through said second drum volume, said transporting through said second drum volume occurring in a second residence time, said second residence time being longer than said first residence time; and
  - adhering a dry powder material directly to the liquid material of the individual pieces of confectionery product during said second residence time, wherein the dry powder material binds to the liquid material coating the individual pieces of confectionery product.

## REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Rihl	US 1,606,721	Nov. 9, 1926
Nohynek	US 3,911,860	Oct. 14, 1975
Cherukuri	US 4,250,195	Feb. 10, 1981
Nothum, Sr.	US 5,937,744	Aug. 17, 1999
Degady	US 2002/0009517 A1	Jan. 24, 2002
O'Hara	US 2008/0193632 A1	Aug. 14, 2008

## REJECTIONS

The Examiner maintains the following rejections under pre-AIA  
35 U.S.C. § 103(a):

1. Claims 22, 24–27, 29, 31, 32, 37, 38, 40, and 41 over Degady;
2. Claims 28, 30, 33, and 34 over Degady and Nohynek;
3. Claim 35 over Degady and O'Hara;
4. Claim 36 over Degady and Rihl;
5. Claim 39 over Degady and Nothum, Sr.; and
6. Claims 42 and 43 over Degady and Cherukuri.

## OPINION

### *Claim 22*

The Examiner finds that Degady teaches a method for continuously coating individual pieces of a confectionery product, including transporting the individual pieces through a first rotating drum where a first material is applied and transporting the individual pieces through a second drum where a second material is applied. Non-Final Act. 3. The Examiner acknowledges that Degady does not teach that the first material is liquid and the second material is a dry powder. *Id.* at 4. Relying on Degady's teaching

that the method is applicable to both liquid and powder materials, the Examiner determines “it would have been obvious to have the first material be a liquid material and the second material be a dry powder material where such a coating is desired.” *Id.* (citing Degady Abstract). Regarding the “adhering” step of claim 22, the Examiner finds that “[a]s Degady et al. teach only liquid and powder coatings, the dry powder is considered to adhere directly to the liquid coating and the dry powder binds to the liquid material.” *Id.*

Appellant challenges the Examiner’s obviousness rejection, arguing Degady fails to teach a system where a liquid material is applied to the individual pieces of confectionary in the first drum and a dry powder material is applied to the pieces of confectionary product in the second drum such that the dry powder material binds to the liquid material coating the individual pieces of confectionery product.

Appeal Br. 11.

After considering arguments and evidence presented in the Appeal Brief and the Examiner’s answer and the record as a whole, we determine that the evidence and reasoning presented by the Examiner are not sufficient to support the rejection of claim 22 as obvious in view of Degady.

The Examiner agrees that Degady does not disclose a coating process in which the first material is liquid and the second material is a dry powder. Non-Final Act. 4; Ans. 4. The Examiner’s evidence and findings are not sufficient to show that it would have been obvious to modify Degady’s process to include sequential application of liquid followed by dry powder. The Examiner determines “it would have been obvious to have the first material be a liquid material and the second material be a dry powder material where such a coating is desired.” Non-Final Act. 4; Ans. 4, 12.

That determination assumes “such a coating is desired,” without providing evidence or reasoning sufficient to support such a finding. *Id.* Even if we were to assume that it was known in the art to coat a confectionery product with liquid followed by dry powder—a fact unsupported on this record—the Examiner does not provide evidence or reasoning sufficient to support combining such knowledge with Degady’s automated dual rotating drum coating process.

The Examiner’s findings regarding the “adhering” step of claim 22 are not sufficient to cure the defects in the Examiner’s evidence and reasoning regarding sequential application of liquid and dry powder. The Examiner asserts “one of ordinary skill would have understood that the cores must be tacky in order for the dry powder to adhere to the confectionery pieces.” Non-Final Act. 4; Ans. 4. That assertion assumes a process that includes the sequential application of liquid followed by dry powder. The Examiner does not provide evidence or reasoning sufficient to support a finding that it would have been obvious to modify Degady’s process to include these sequential steps.

In response to Appellant’s arguments, the Examiner asserts:

One of ordinary skill would have recognized that in order for a powder coating to adhere, the surface of the comestible must be tacky. (Note: it is common sense that a dry, non-tacky, surface would not adhere dry powder.) A simple solution of making the surface tacky by coating it with a liquid would be well within the ordinary skill in the art in the same way that the home cook coats food with a liquid in order for a dry coating material to adhere when breading food in the home kitchen. The level of skill in the art is very low, the common cook

understands what is needed so is it reasonable that it would be easy for a food scientist to do the same.

Ans. 15. The Examiner’s reasoning relies on common sense to supply a limitation of the claim missing from the cited art—an approach discouraged by our reviewing court. *DSS Tech. Mgmt. v. Apple, Inc.*, 885 F.3d 1367, 1374–75 (Fed. Cir. 2018) (“In cases in which ‘common sense’ is used to supply a missing limitation, as distinct from a motivation to combine, . . . our search for a reasoned basis for resort to common sense must be searching,” (quoting *Randall Mfg. v. Rea*, 733 F.3d 1355, 1363 (Fed. Cir. 2013))). The Examiner has not provided a reasoned basis for relying on common sense to supply the limitations of claim 22 that are missing from Degady.

*Claims 24–43*

The deficiencies in the Examiner’s findings and conclusions regarding independent claim 22 and Degady, as discussed above, are not remedied by the Examiner’s findings and conclusions regarding dependent claims 24–43, Degady, and the additional references relied upon to reject those claims.

CONCLUSION

The Examiner’s rejections are reversed.

DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
22, 24–27, 29, 31, 32, 37, 38, 40, and 41	103(a)	Degady		22, 24–27, 29, 31, 32, 37, 38, 40, and 41

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<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
28, 30, 33, and 34	103(a)	Degady and Nohynek		28, 30, 33, and 34
35	103(a)	Degady and O'Hara		35
36	103(a)	Degady and Rihl		36
39	103(a)	Degady and Nothum, Sr.		39
42 and 43	103(a)	Degady and Cherukuri		42 and 43
<b>Overall Outcome</b>				22 and 24-43

REVERSED