UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

*Ex parte* EWA URSZULA PADLO
Appellant

Appeal 2008-5028
Application 10/406,951
Technology Center 1600

Decided: November 14`, 2008

Before RICHARD TORCZON, SALLY GARDNER LANE, and MICHAEL P. TIERNEY, *Administrative Patent Judges*.

Opinion for the Board filed by Administrative Patent Judge LANE.

Opinion Concurring filed by Administrative Patent Judge TORCZON.

LANE, Administrative Patent Judge.

DECISION ON APPEAL

## I. STATEMENT OF THE CASE

The appeal, under 35 U.S.C. § 134, is from a Final Rejection of claims 1-12, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part and enter a new grounds of rejection.

The real party in interest is said to be Unilever Home & Personal Care USA, Division of Conopco, Inc. (App. Br. 3).

The Examiner relied on the following references:

| Name | Number | Date |
|---|---|---|
| Bergquist | 6,919,089 | Jul. 19, 2005 |
| Slavtcheff | 6,451,331 | Sep. 17, 2002 |
| Davis | 5,720,949 | Feb. 24, 1998 |
| Holtmann | EP 0 980 926 | Feb. 23, 2000 |
| Renaud | FR 2 725 145 | Apr. 5, 1996 |

Appellant appealed the Examiner's rejection of claims 1-5 under 35 U.S.C. § 103(a) over the combination of the teachings of Holtmann and Renaud. Appellant appealed the rejection of claims 6 and 7 under 35 U.S.C. § 103(a) over the combination of the teachings of Holtmann, Renaud, and Davis. Appellant also appealed the rejections of claims 1-12 under 35 U.S.C. § 103(a) over Slavtcheff and under 35 U.S.C. § 103(a) over Bergquist. Appellant argued for the separate patentability of claims 9, 11, and 12 over each of Slavtcheff and Bergquist.

## II. FINDINGS OF FACT AND ANALYSIS

### *Facts Relating to the Rejection over Holtmann and Renaud*

1. Appellant's claim 1 recites:

> A towelette tablet product comprising:
> (i) a water-insoluble fibered web compressed into a tablet form, the web fully extended having a major surface area greater than 10 times a total surface area of the tablet form; and
> (ii) a personal care composition formulated into the tablet form.

(App. Br. 18, Claim Appx.).

2. Holtmann discloses "compressed non-woven towels," which are

> compacted there with the aid of a compression piston . . . that cooperates with the compression mould . . . and is operated at a high compressive force, so chosen that the non-woven towel . . . will not open up again by itself, but only when it is wetted with a liquid.

(Holtmann Summary).

3. Holtmann provides that "Fig. 2C shows a non-woven towel . . . in a pill-like compressed form which can be packed in tubes of the kind used for pills." (Holtmann ¶ [0022]).

4. Holtmann teaches that "[t]he non-woven towels . . . compacted according to the present invention can be opened up e.g. with the aid of water, but any other liquid or pharmaceutical or cosmetic solution is also suitable for this purpose." (Holtmann ¶ [0024]).

5. Holtmann provides that the "non-woven towels . . . can be compacted in the wet state and dried either during or after the compaction." (Holtmann ¶ [0021]).

6. Renaud teaches "filing the previously compressed cavities of a sponge with a liquid or paste by injection under pressure . . . ." (Renaud Abstract).

7. Renaud teaches a process in which "it is sufficient to inject the liquid under pressure into the compressed sponge . . . . The liquid diffuses homogeneously throughout the sponge and displaces the residual air from the compressed cavities toward the edges until the remaining free space in the sponge is filled with liquid." (Renaud 4).

8. Renaud teaches that the process disclosed can be used to create "a disposable means for the user to apply soap during a shower." (Renaud 2).

9. Renaud explains that the sponges it teaches are useful because

> it is difficult to keep a damp bath mitt from becoming mildewed in the luggage. Hotels usually provide soap, but people traveling long distances must often carry soap with them to wash in train station or airport rest rooms, and it is difficult to keep this soap without some sort of special package.

(Renaud 2).

***Analysis of the Rejection over Holtmann and Renaud***

The Examiner rejected claims 1-5 under 35 U.S.C. § 103 over Holtmann and Renaud. We review claim 1 as a representative claim. Bd.R. 37(c)(1)(vii).

Holtmann teaches "compressed non-woven towels," which are "compacted there with the aid of a compression piston . . . " (FF 2) and assume a "pill-like" form after compression. (FF 3). Thus, Holtmann teaches a towel comprising a web "compressed into a tablet form," as claimed in Appellant's claim 1. Appellant did not dispute that Holtmann teaches that "the web fully extended having a major surface area greater than 10 times a total surface area of the tablet form," as recited in Appellant's claim 1.

Renaud teaches "filling the previously compressed cavities of a sponge with liquid or paste by injection under pressure . . . ." (FF 6). Specifically, Renaud teaches a process in which "it is sufficient to inject the liquid under pressure into the compressed sponge . . . . The liquid diffuses homogeneously throughout the sponge and displaces the residual air from the compressed cavities toward the edges until the remaining free space in the sponge is filled with liquid." (FF 7). Renaud teaches that this liquid can be soap for use during a shower. (FF 8). Thus Renaud teaches a

compressed personal care item, *i.e.* a sponge, with an impregnated personal care composition, *i.e.* soap.

From the teaching of Renaud, those of skill in the art would have expected that a towel compressed into a tablet form in Holtmann could also include a person care composition. Renaud teaches that there would have been reason to do so because the compressed towel could be used, for example, for showering while on a trip. (FF 9). The Supreme Court indicated that obviousness can be found where "[c]ommon sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle." *KSR Int'l Co., v. Teleflex Inc.*, 127 S.Ct. 1727, 1742 (2007). Thus, the combination of Holtmann and Renaud present a prima facie case for the obviousness of the product recited in Appellant's claim 1.

Appellant argued that Holtmann "teaches away" from the incorporation of a personal care composition into a compressed tablet because "[t]he disclosure at paragraph [0024] teaches opening of the tablet with water or any other liquid or cosmetic solution. The skilled chemist is taught to post-dose during reconstitution of tablet into web rather than incorporate any cosmetic fluid within the compressed tablet." (App. Br. 15). While Holtmann teaches that the compressed towel can be opened up with liquids, such as cosmetics (FF 4), this would not have taught away from incorporation of cosmetics into the tablet. "A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant." *In re*

*Gurley*, 27 F3d 551, 553 (Fed. Cir. 1994). Appellant has not explained why disclosure of opening a towel with a liquid would discourage incorporating a personal care composition into the towel before opening. If anything, it suggests the combination of Holtmann's towels with such a composition. Moreover, Holtmann provides that the "non-woven towels . . . can be compacted in the wet state and dried either during or after the compaction." (FF 5). Thus, Holtmann shows that those of skill in the art would not consider including liquid personal care compositions to impede compression of the disclosed towel.

Appellant also argued that "[n]othing in Holtmann et al. teaches or suggests that there could be aspects in Renaud suitable for combination." (App. Br. 15). According to the Appellant, "[n]owhere has the Examiner provided textual basis as to why the claimed combination of references teaches, suggests or motivates arrival at the claimed invention." (App. Br. 16). But, "any need or problem known in the field of endeavor at the time of the invention and addressed by the patent can provide a reason for combining the elements in the manner claimed." *KSR*, 127 S.Ct. at 1742. As explained above, both Holtmann and Renaud teach compressing an object used in personal care, such as a towel or sponge. Renaud teaches that one would have incorporated a personal care composition into a compressed sponge and that it would have had advantages for travelers and others who do not want to carry wet, soapy personal care items with them. Thus, we find reason why those in the art would have combined the teachings of Holtmann and Renaud.

Accordingly, the Examiner did not err in rejecting claim 1 under 35 U.S.C. § 103(a) over Holtmann and Renaud.

Below, we reverse the Examiner's rejections of claims 9 and 12 over the references relied upon by the Examiner. We enter the following new grounds of rejections for claims 9 and 12 under 35 U.S.C. § 103(a) in view of Holtmann and Renaud.

***Facts Relating to New Grounds of Rejection over Holtmann and Renaud***

10. Appellant's claim 9 recites:

> The product according to claim 1 wherein the fibered web is a mask towelette comprising cutouts forming two eye areas and a mouth area.

(App. Br. 19, Claim Appx.).

11. Holtmann teaches "[t]he non-woven towel can have the form of a face mask . . . . In this case, two openings for the eyes and one for the mouth are removed from the non-woven towel." (Holtmann ¶ [0010]).

12. Appellant's claim 12 recites:

> A towelette tablet product comprising:
> (i) a water-insoluble fibered single layer web compressed into a tablet form, the web fully extended having a major surface area greater than 10 times a total surface area of the tablet form; and
> (ii) a personal care composition formulated into the tablet form.

(App. Br. 19, Claim Appx.).

13. Holtman discloses "non-woven towels . . . with the required shape [punched] from the web . . . of non-woven material, this web having two layers in the present case." (Holtmann ¶ [0016]).

***Analysis of New Grounds of Rejection over Holtmann and Renaud***

Holtmann teaches that the towel it discloses can "have the form of a face mask" with "two openings for the eyes and one for the mouth . . . ."

(FF 11). Appellant's claim 9 is drawn to the product of claim 1, "comprising cutouts forming two eye areas and a mouth area." (FF 10). Thus, the combination of Holtmann and Renaud also renders the subject matter of Appellant's claim 9 obvious. Accordingly, we enter a new grounds of rejection for claim 9 under 35 U.S.C. § 103(a) over Holtmann and Renaud.

Appellant's claim 12 recites "a water-insoluble fibered **single layer web** compressed into a tablet form….." (FF 12 (emphasis added)). Holtmann teaches "non-woven towels . . . with the required shape [punched] from the web . . . of non-woven material, this web having two layers in the present case" (FF 13), but we do not find where Holtmann expressly teaches a single layer web. Those of skill in the art would have found a towel of a single layer to be a "predictable variation" of the towel described in Holtmann. *See KSR*, *supra.* Indeed, Appellant argued, in response to a different rejection, that "[i]t is not easy to compress a web. A second layer would render the task even more difficult." (App. Br. 14). Those of ordinary skill in the art would have have appreciated a fact so elementary, would have had an expectation of success in using a single layer web towel, and would have had reason to produce the compressed web more easily. Accordingly, we enter a new grounds of rejection for claim 12 under 35 U.S.C. § 103(a) over Holtmann and Renaud.

***Analysis of Obviousness over Holtmann, Renaud, and Davis***

As to the rejection of claims 6 and 7, Appellant argued only that "Davis does not remedy the deficiencies of the combination of those references with respect to claim 1." (App. Br. 16). As explained above, we do not consider there to be deficiencies in the prima facie case for the

obviousness of the subject matter claimed in Appellant's claim 1. Accordingly, Appellant has not convinced us that the Examiner erred in rejecting claims 6 and 7 under 35 U.S.C. § 103(a) over the Holtmann, Renaud, and Davis.

***Facts Relating to the Rejection over Slavtcheff***

14. Slavtcheff teaches:

> Cosmetic wiping articles of the present invention when contacted with water billow to many times (more than 10 but often more than 40 times) their dry size when activated by water.
>
> * * *
>
> Now it has been discovered that maximum billowing can be achieved by use of one or more pleats on at least one of the walls that define the sachet. Pleats are preferably double folded segments of a wall pressed together in place with capacity for expansion to a volume greater than its original folded volume.

(Slavtcheff col. 2, ll. 54-67).

15. Slavtcheff teaches that "[a]t least one of the sachet walls must be water permeable. Suitable materials for forming the walls are rayon, polyester, polyethylene, polypropylene, cotton or any fiber combination thereof. These sheets may be woven or non-woven." (Slavtcheff col. 3, ll. 31-34).

16. Slavtcheff teaches that

> [a] variety of skin benefit agents may be included to improve afterfeel properties. . . . These include emollients, antiaging actives, antibacterials and fungicides, skin lighteners, sunscreens and combinations thereof. Amounts of the skin benefit agents may range from about 0.001 to about 30%, preferably from about 0.1 to about 20%, more preferably from about 0.5 to about 10%, optimally between about 1 and about 5% by weight of the total composition.

(Slavtcheff col. 5, ll. 9-21).

17. Slavtcheff does not teach a specific amount of compression used to make the pleated sachets.

18. Appellant's specification provides that "[p]ressures from about 2 to about 100 psi, most preferably between about 2 and about 10 psi and even higher amounts may be employed dependent upon the particular equipment utilized." (Spec. ¶ [00048]).

19. Slavtcheff teaches that "[u]nlike laundry sachet articles, those of the present invention should not rupture which would cause dispersion of their granular contents into wash water." (Slavtcheff col. 3, ll. 39-45).

***Analysis of the Rejection over Slavtcheff***

The Examiner rejected claims 1-12 under 35 U.S.C. § 103(a) over Slavtcheff.

<u>Claims 1-8 and 10</u>

Appellant grouped claims 1-8 and 10 together in their argument against this rejection. We review claim 1 as a representative claim. Bd. R. 37(c)(1)(vii).

Slavtcheff discloses wiping articles that "when contacted with water billow to many times (more than 10 but often more then 40 times) their dry size when activated by water," due to the "use of one or more pleats on at least one of the walls defined by the sachet." (FF 14). Slavtcheff teaches that the wiping articles include "a variety of skin benefit agents," such as emollients, antiaging actives, etc., into the wipe. (FF 16). The wiping articles of Slavtcheff can be made of woven or non-woven sheets from materials recited in Appellant's specification (FF 15). Slavtcheff does not

teach a specific amount of compression used to make the pleated sachets. (FF 17).

Appellant argued that the pleats of the sachet taught in Slavtcheff differ from the claimed product because

> [p]leats are folded rather than compressed structural features. Consider that a lady's pleated skirt or man's pleated pants clearly are not considered as being compressed structures. Pleats are folded over textile with potential for umbrella-like opening upon activation. By contrast, the presently claimed towelette product is a tablet form. This means no fillable air space.

(App. Br. 8). Appellant also noted that "'[t]ablet' is defined in Webster's Ninth New Collegiate Dictionary (1991) as 'compressed or molded block of a solid material.'" (App. Br. 11-12). Appellant did not cite to, and we do not find, any specific portion of the specification that supports the amount of compression of the claimed product to produce "no fillable air space" or a solid product, as counsel argued. While Appellant's specification provides that "[p]ressures from about 2 to about 100 psi, most preferably between about 2 and about 10 psi and even higher amounts may be employed dependent upon the particular equipment utilized" (FF 18), Appellant did not provide evidence that those in the art would have known that the products of this range of pressures would be solid, with "no fillable air space." "Argument of counsel cannot take the place of evidence lacking in the record." *Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977).

In contrast, the Examiner asserted that

> the term "compress" as defined by the Merriam Webster's Collegiate Dictionary, Tenth Edition, (1999), states that "compress" can mean (1) to press or squeeze together; (2) a

> folded cloth or pad applied so as to press upon a body part; (3) press together; reduced in size or volume. Thus, Appellant's argument that the term "compressed" is not found in the Slavtcheff reference was not persuasive, since, the prior art's pleats, which are folded, would be considered compressed.

(Ans. 6). "During examination, 'claims . . . are to be given their broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.'" *In re American Academy of Sci. Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)(citations omitted). Thus, we are not convinced that Appellant's claim 1 does not encompass some degree of compression to form the pleated sachets in Slavtcheff. Furthermore, the sachets of Slavtcheff "billow to many times (more than 10 but often more than 40 times) their dry size" (FF 14), indicating that they are compressed to some degree or could be modified to be further compressed with the range recited in Appellant's specification.

Appellant also argued that

> Deployment is also different. Slavtcheff et al. achieves expansion of the pleats through generation of an internal effervescent gaseous evolution. This gaseous evolution (internal pressure) arises from seepage of water into the sachet. Appellant's tablet does not expand from generation of any internal gas. Instead, deployment of the web results from the wetting action of the water itself against the tightly compressed tablet. See appellant's Abstract stating that: "When placed into water, the tablet allows the web to open in a fully extended manner[.]" While water "explodes" the tablet to release the web, in Slavtcheff et al, water has no direct effect upon the web of sachet. Instead, water activates a carbonate to release gas which then expands the sachet walls. The mechanisms are

> different and the article structures are different. For these reasons there indeed is a patentable distinction.

(App. Br. 8-9). Claim 1 is not restricted to a specific mechanism that fully extends the web of the towelette tablet. Thus, we are not convinced that any difference between the deployment of Slavtcheff's sachet and the claimed tablet is a patentable distinction. "[A]pparatus claims cover what a device *is*, not what a device *does*." *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990) (emphasis in original).

Accordingly, the Examiner did not erred in rejecting claim 1, and claims 2-8 and 10, which Appellant grouped with claim 1, under 35 U.S.C. § 103(a) over Slavtcheff.

Claim 9

Appellant's claim 9 limits the web of claim 1 to a "mask towelette comprising cutouts forming two eye areas and a mouth area." (FF 10).

Appellant argued that the "[p]illows of Slavtcheff et al. must be sealed. Were they to have holes (e.g. eyes and/or mouth) the effervescent gases would escape without causing billowing expansion of the sachet." (App. Br. 9). Indeed, Slavtcheff teaches that "[u]nlike laundry sachet articles, those of the present invention should not rupture which would cause dispersion of heir granular contents into wash water." (FF 19).

The Examiner asserted that

> [t]he particular design of the mask having cutouts for the eye and mouth areas does not distinguish over the teachings of the art. It is deemed obvious to one of ordinary skill in the cosmetic art to formulate a mask having apertures for the eye and mouth areas, thus preventing possible irritation.

(Ans. 8). The Examiner did not explain why there would be an expectation of success in cutting out eye and mouth areas in the sachets taught in Slavtcheff. From Slavtcheff's teaching that the sachet should not "rupture," we do not think there would be an expectation of success with such cutout areas. Accordingly, the Examiner erred in rejecting claim 9 under 35 U.S.C. § 103(a) over Slavtcheff.

Claim 11

Appellant's claim 11 recites:

> The product according to claim 1 wherein the web has been compressed under a pressure from about 2 to about 100 psi.

(App. Br. 19, Claims Appx.). While Slavtcheff does not teach these specific pressure values (FF 17), as explained above, Appellants did not provide evidence that those of skill in the art would not consider the amount of compression to make the pleat of Slavtcheff's sachets to be within the claimed range or would not have modified the sachets to be made under the claimed range of compression to achieve more billowing of the expanded sachet. Indeed, Appellant seemed to have acknowledged that the claimed range is not an optimization. (*See* App. Br. 13 ("appellant submits that the 2-100 psi recitation is simply meant to highlight the term 'compressed'. It is not a statement of 'manipulative experimentation' to prove criticality of the numerical range.")). Thus, those of skill in the art would have used the specific pressure claimed by Appellant as a "predictable variation" of the pressure used to form the sachet of Slavtcheff. *See KSR*, *supra*.

Accordingly, the Examiner did not err in rejecting claim 11 under 35 U.S.C. § 103(a) over Slavtcheff.

Claim 12

Appellant's claim 12 recites:

> A towelette tablet product comprising:
> (i) a water-insoluble fibered single layer web compressed into a tablet form, the web fully extended having a major surface area greater than 10 times a total surface area of the tablet form; and
> (ii) a personal care composition formulated into the tablet form.

(FF 12). Appellant contended then "the cleansing pillows also referred to as sachets in the reference [Slavtcheff] are in the form of a pouch. These require front and rear walls between which is placed an effervescent chemical system. The front and rear walls thereby represent two layers that form the pillow or sachet web." (App. Br. 10 (emphasis in original)).

The Examiner agreed that "[a]dmittedly, the sachets of Slavtcheff require front and rear walls, interpreted as a two-layer system." (Ans. 9). According to the Examiner, though,

> the prior art teaches a similar expandable article, that provides for the same properties and results as that desired by Appellant regardless of the number of layers employed; in this instance, the reference employing one additional layer. Appellant has the burden of establishing by a showing or scientific data, the reduced effectiveness alleged by the additional layer disclosed in the art.

(Ans. 9). The Examiner did not explain why those of skill in the art would have had an expectation of success with a sachet comprising only a single layer web. In fact, Slavtcheff states that "maximum billowing can be achieved by use of one or more pleats on at least one of the walls that define the sachet." (FF 14). Thus the disclosed sachet must have more than one

layer of web to be operable. Accordingly, the Examiner erred in rejecting claim 12 under 35 U.S.C. § 103(a) over Slavtcheff.

***Facts Relating to the Rejection over Bergquist***

20. Bergquist teaches "inflatable sachets containing an effervescent dry powder activatable to release gases and thereby outwardly billow the sachet." (Bergquist col. 1, ll. 10-12).

21. The Examiner did not cite, and we do not find, where Bergquist teaches a sachet or other product that is "compressed."

***Analysis of the Rejection over Bergquist***

Bergquist discloses "inflatable sachets" that "outwardly billow" when gasses are released with effervescence. (FF 20). The Examiner asserted that

> Bergquist ('089) teaches a cosmetic sachet comprising a web of compressed water-insoluble, non-woven fibers, a skin benefit agent, and an effervescent cleaning system wherein once the sachet is wetted, it releases the contents via dissolution through the permeable walls of the sachet much like the active ingredients diffuse through a pill or tablet (Abstract; column 6, lines 38-51; column 9, lines 50-55).

(Ans. 10). According to the Examiner, "[t]he artisan would have been motivated to calculate the weight ratio of cosmetic to the fibrous material in order to determine the amount of pressure needed to compress and house the material in the sachet and to determine the amount of ingredients to include in the sachet." (Ans. 11). Whether or not those in the art would have been motivated to determine an amount of pressure, the Examiner did not cite any specific mention in Bergquist of a compressed article and we do not find any mention of one. (FF 21). The Examiner also did not provide any reason

why one of skill in the art would compress the sachet. Unlike the sachet of Slavtcheff, which relies on compressed pleats to achieve "maximum billowing" (FF 14), the sachet of Bergquist has no compressed component that expands when wet. Without a teaching of or reason to modify the sachet taught in Bergquist to be compressed, the Examiner has failed to present a prima facie case for obviousness. *See KSR,* 127 S.Ct. at 1740 ("Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit.").

Accordingly, the Examiner erred in rejecting claim 1, as well as the claims that depend on it, and claim 12, under 35 U.S.C. § 103(a) over Bergquist.

## III. ORDER

Upon consideration of the record and for the reasons given,

the Examiner's rejection of claims 1-5 under 35 U.S.C. § 103(a) over Holtmann and Renaud is AFFIRMED;

the Examiner's rejection of claims 6 and 7 under 35 U.S.C. § 103(a) over Holtmann, Renaud, and Davis is AFFIRMED;

the Examiner's rejection of claims 1-8 and 10 under 35 U.S.C. § 103(a) over Slavtcheff is AFFIRMED;

the Examiner's rejection of claim 9 under 35 U.S.C. § 103(a) over Slavtcheff is REVERSED;

the Examiner's rejection of claim 11 under 35 U.S.C. § 103(a) over Slavtcheff is AFFIRMED;

the Examiner's rejection of claim 12 under 35 U.S.C. § 103(a) over Slavtcheff is REVERSED; and

the Examiner's rejection of claims 1-12 under 35 U.S.C. § 103(a) over Bergquist is REVERSED.

We enter a new grounds of rejection for claims 9 and 12 under 35 U.S.C. § 103(a) over Holtmann and Renaud for the reasons set forth herein. 37 C.F.R. § 41.50(b).

37 C.F.R. § 41.50(b) provides that, "[a] new grounds of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of proceedings as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner; or

(2) Request that the proceeding be reheard under 37 C.F.R. § 41.52 by the Board upon the same record.

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-IN-PART;

NEW GROUNDS ENTERED 37 C.F.R. § 41.50(b)

TORCZON, *Administrative Patent Judge*, concurring.

I join the majority in its affirmance of rejections, and its new grounds rejection, based on Holtmann. I also join in the reversal of the rejections based on Bergquist. I would not, however, reach the rejections over Slavtcheff except as necessary to reverse the rejections of claims 9 and 12. Would a person having ordinary skill in the art have considered Slavtcheff's sachet to be a tablet? The majority opinion leaves me pondering the question rather than persuaded by a preponderance of the evidence.

rvb

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