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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRENDA K. CREMER, HENRY K. LEUNG, BRIDGET MANIS,
KELLY S. MILLER, JASON T. NIERMANN, TIMOTHY F. ROOT,
MARK W. SHEPPARD, JIM STALDER and JO ELLEN WAYNE

Appeal 2013-0004102
Application 11/700,009
Technology Center 1700

Before JEFFREY T. SMITH, JAMES C. HOUSEL, and
DONNA M. PRAISS, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 1, 3 through 12 and 14 through 21. We have jurisdiction under 35 U.S.C. § 6.

Appellants' invention is directed to a vegetable powder and process of manufacturing the same. App. Br. 2-3. Claim 1 is illustrative of the subject matter on appeal and is reproduced below (bullet points omitted):

1. A free flowing vegetable powder comprising an intimate mixture of at least three different dehydrated vegetables that together represent at least 60 wt. % of the vegetable dry matter contained in the powder, said at least three vegetables including:

5-60% of onion by weight of vegetable dry matter;

20-90% by weight of vegetable dry matter of moderately colored vegetable selected from the group consisting of vegetables belonging to the genus Cucurbita, vegetables belonging to the genus Oleracea, sweet corn, sweet potato, green bean, edamame, celery and combinations thereof; and

5-75% by weight of vegetable dry matter of intensely colored vegetable selected from the group consisting of tomato, red bell pepper, red beet, radicchio, swiss chard, rhubarb, peppers, yam, Adzuki beans, carrot, green pea, green bell pepper, asparagus, spinach, Brussels sprouts, kale, egg plant and combinations thereof;

wherein the at least three vegetables have been co-dried from a homogenous mixture of an aqueous blend of the vegetables and said free flowing powder further has a moisture content of less than 10 wt.% and a mass weighted average particle size within the range of 10-500 microns.

The Examiner relied on the following references in rejecting the appealed subject matter:

Taga	US 5,264,238	Nov. 23, 1993
Ree	US 2004/0052916 A1	Mar. 18, 2004
Dimitrov	WO 2005/000028 A1	Jan. 6, 2005

Appellants (Reply Br. 1-2) request review of the following rejections from the Examiner's final office action:¹

1. Claims 1, 3-12, 17-19 and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ree, Dimitrov and Taga.
2. Claims 14-16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ree and Dimitrov.
3. Claims 14-16 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ree, Dimitrov and Taga.

OPINION

Rejection 1

The dispositive issue for this rejection on appeal is: Did the Examiner err in determining that the combination of Ree, Dimitrov and Taga would

¹ The Reply Brief filed September 1, 2011 better reflects the rejections appealed before the Board. The Examiner withdrew the rejections of claims 1, 3-12 and 21 under 35 U.S.C. § 103(a) over Ree and Dimitrov and of claims 17-19 under 35 U.S.C. § 103(a) over Ree, Dimitrov and Taga in view of an amendment concurrently filed with the Notice of Appeal on November 12, 2010. Ans. 3; Misc. Communication 2. The Examiner instituted a new ground of rejection of claims 1, 3-12, 17-19 and 21 under 35 U.S.C. § 103(a) over Ree, Dimitrov and Taga. Ans. 3. Appellants timely responded to the new ground of rejection by filing a Reply Brief on May 24, 2011.

have led one of ordinary skill in the art to a free flowing vegetable powder as required by the subject matter of claim 1?^{2,3}

After thorough review of the respective positions provided by Appellants and the Examiner, we AFFIRM for the reasons presented by the Examiner and add the following for emphasis.

We refer to the Examiner's Answer for a statement of the Examiner's rejection (Ans. 10-14).

The Examiner found that Ree discloses a vegetable powder product similar to Appellants' claimed vegetable powder comprising a mixture of three different dehydrated vegetables, including moderately colored vegetables. *Id.* at 10. While the Examiner found that Ree does not disclose a vegetable powder having the claimed amount of moderately colored vegetables of 20-90% (*id.*), the Examiner recognized that one skilled in the art would have reasonably been capable of adjusting the amount of the moderately colored vegetable based on the desired properties for the vegetable powder (*id.* at 11). The Examiner also recognized that Dimitrov discloses vegetable powders of a particle size of 20-120 microns and having a moisture content of 10%. *Id.* at 12.

Appellants argue that the Examiner failed to recognize that the claimed vegetable powder is made by co-drying vegetables from a homogenous mixture of an aqueous blend of the vegetables resulting in a vegetable powder having superior properties. Reply Br. 2-4.

² We will limit our discussion to independent claim 1.

³ A discussion of the Taga reference will be unnecessary for disposition of the present appeal. The Examiner relied upon this reference for describing features not related to the dispositive issue.

Appellants' argument is directed to a process limitation while the claim is directed to a product by process. It is well-settled that a claim in product-by-process format is a claim to the product. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1317 (Fed. Cir. 2006) (“[r]egardless of how broadly or narrowly one construes a product-by-process claim, it is clear that such claims are always to a product, not a process.”). Moreover, “[i]f the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is *unpatentable* even though the prior product was made by a different process.” *Id.*, quoting *In re Thorpe*, 777 F.2d 695, 697 (Fed. Cir. 1985) (emphasis added). Finally, our reviewing court has long held that

when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith.”

In re Brown, 459 F.2d 531, 535 (CCPA 1972).

While Appellants argue that making the claimed vegetable powder by co-drying the vegetables leads to unexpected results and superior properties (App. Br. 4), Appellants have directed us to no objective evidence in support of this contention. Appellants have not adequately demonstrated that the claimed product is different from the product of the prior art.

In the absence of evidence addressing the patentability of product claim 1 over the cited references, we affirm the rejection of claims 1, 3-12, 17-19 and 21 under 35 U.S.C. § 103(a) as being unpatentable over Ree,

Dimitrov and Taga for the reasons given above and presented by the Examiner.

Rejections 2 and 3

The dispositive issue for these rejections on appeal is: Did the Examiner err in determining that the combination of Ree and Dimitrov would have led one of ordinary skill in the art to a method of manufacturing a free flowing vegetable powder including a step of combining the vegetables in an aqueous blend to form a homogeneous mixture to be dried as required by the subject matter of claim 14?^{4,5}

After thorough review of the respective positions provided by Appellants and the Examiner, we REVERSE these rejections for the reasons presented by the Appellants and add the following for emphasis.

For Rejection 2, the Examiner found that Ree discloses preparing a vegetable powder product using a method comprising the basic steps of drying vegetables, mixing vegetables, and forming the vegetables into a powder. Ans. 4. The Examiner found that Ree does not disclose combining the vegetables in an aqueous blend having a solids content of 10-40 weight percent, mixing the vegetable blend in a homogeneous mixture, and drying the homogeneous mixture to obtain a vegetable powder. *Id.* at 5. However, the Examiner reasoned that the solids content of the aqueous blend of the vegetables is contingent upon the water content of the vegetables chosen as well as the desired texture and size of the final powdered product. *Id.* Thus, the Examiner found that it would have been obvious to mix and mash the

⁴ We will limit our discussion to independent claim 14.

⁵ A discussion of the Dimitrov reference will be unnecessary for disposition of the present appeal. The Examiner relied upon this reference for describing features not related to the dispositive issue.

vegetables disclosed by Ree to form a homogenous paste or slurry (a homogenous mixture of an aqueous blend of vegetables) having a solids content of 10-40 wt. % and dehydrate the vegetables to make the vegetable powder. *Id.* at 6.

Appellants argue that the Examiner's Answer fails to fully recognize the significance of preparing an aqueous blend of vegetables, intimately mixing the aqueous blend of vegetables to produce a homogenous mixture and drying the homogenous mixture as required by the subject matter of dependent claim 14. Reply Br. 6.

We agree with Appellants. As acknowledged by the Examiner (Ans. 5), Ree does not disclose combining the vegetables in an aqueous blend as claimed by Appellants. While the Examiner contends that the aqueous blend of the vegetables is contingent upon the water content of the vegetables chosen (*id.*), the Examiner directs us to no section of Ree (or Dimitrov) or proffers any other evidence to support this contention. The Examiner has not adequately explained why the water content within the vegetables chosen to make the vegetable powder would have been sufficient to form an aqueous blend as required by the subject matter of dependent claim 14.

Accordingly, we reverse the Examiner's rejection of claims 14-16 as unpatentable under 35 U.S.C. § 103(a) over Ree and Dimitrov for the reasons given above and presented by Appellants.

Claims 14-16 and 20 additionally stand rejected as unpatentable under 35 U.S.C. § 103(a) over Ree, Dimitrov and Taga (Rejection 3).

The Examiner relied on the teachings of Ree in this rejection for essentially the same reasons as presented in the prior rejection. *Id.* at 6-7. The Examiner further relied on the additional reference to Taga to teach

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making a paste of two or more vegetable powders. *Id.* at 8. Appellants argue, and we agree, that Taga does not disclose forming vegetable powders but instead forms a paste to be shaped into a snack food. App. Br. 10-11; Reply Br. 6.

Accordingly, we also reverse this rejection for the reasons given above and presented by Appellants.

ORDER

The rejection of claims 1, 3-12, 17-19 and 21 under 35 USC § 103(a) as unpatentable over Ree, Dimitrov and Taga is affirmed.

The rejection of claims 14-16 under 35 USC § 103(a) as unpatentable over Ree and Dimitrov is reversed.

The rejection of claims 14-16 and 20 under 35 USC § 103(a) as unpatentable over Ree, Dimitrov and Taga is reversed.

TIME PERIOD

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

AFFIRMED-IN-PART

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