



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/213.157	06/16/2008	Elize Willem Bontenbal	132918	8818
25944	7590	11/04/2016	EXAMINER	
OLIFF PLC P.O. BOX 320850 ALEXANDRIA, VA 22320-4850			STULII, VERA	
			ART UNIT	PAPER NUMBER
			1791	
			NOTIFICATION DATE	DELIVERY MODE
			11/04/2016	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

OfficeAction25944@oliff.com  
jarmstrong@oliff.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL  
AND APPEAL BOARD

---

*Ex parte* ELIZE WILLEM BONTENBAL

---

Appeal 2014–009575  
Application 12/213,157  
Technology Center 1700

---

Before CATHERINE Q. TIMM, BEVERLY A. FRANKLIN, and  
ELIZABETH M. ROESEL, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant requests our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 1–4, 6, and 9–11. We have jurisdiction over the appeal under 35 U.S.C. § 6(b). An oral hearing was held on October 21, 2016.

### STATEMENT OF THE CASE

Claim 1 is illustrative of Appellant's subject matter on appeal and is set forth below:

1. A process for manufacturing a cooked meat product comprising combining an uncooked meat product with an organic acid salt and a lactic acid oligomer, followed by cooking the meat product, the lactic acid oligomer being a compound which does not show acidic properties when it is added to the uncooked meat product, but which is converted to an active carboxylic acid with at least 3 carbon atoms under the conditions prevailing during the cooking of the meat product, the organic acid salt being selected from lactate salts, acetate salts, and combinations thereof.

The Examiner relies on the following prior art references as evidence of unpatentability:

Hammond	US 2,982,654	May 2, 1961
Ming	US 2003/0108648 A1	Jun. 12, 2003
Newkirk	US 2004/0170745 A1	Sep. 2, 2004

### THE REJECTION

Claims 1-4, 6, and 9-11 are rejected under 35 U.S.C §103(a) as being unpatentable over Newkirk in view of Ming and Hammond.

## ANALYSIS

We select claim 1 as representative of all the claims on appeal, based upon Appellant's presented arguments. 37 C.F.R. § 41.37(c) (1) (iv) (2014).

We adopt the Examiner's findings and conclusions in the record and AFFIRM. We add the following for emphasis.

The Examiner's findings are set forth on pages 2–5 of the Final Office Action and on pages 2–4 of the Answer, which we incorporate herein.

Appellant argues that it would not have been obvious to have replaced Newkirk's acid with Ming's organic acid salt for the reasons set forth on pages 4–7 of the Appeal Brief (and also discussed in the Reply Brief).

Therein, Appellant submits that Ming lacks any teaching that an organic acid or an organic acid salt are fully interchangeable. Appeal Br. 5. Appellant also argues that Newkirk requires an acid, whereas an organic acid salt is neutral and not acidic. Appeal Br. 6. Appellant also argues that Ming indicates that the organic acid salt be used with propionibacterial metabolite and lantabiotic and/or lytic enzyme. *Id.*

We are unpersuaded by the aforementioned arguments for the reasons stated by the Examiner on pages 4 and 5 of the Answer. Therein, the Examiner explains that there is no significance of the salt presence as opposed to acid presence in the composition of Newkirk. Ans. 5. The Examiner also explains how Ming teaches that either acids or their salts can be using in an antimicrobial composition used for meat preservation. *Id.* It follows (as stated by the Examiner) that one would have been motivated to have made the proposed substitution (regardless of the presence or not of metabolites and lantabiotics). Ans. 5.

Appellant also argues that one skilled in the art would not have had a reasonable expectation of success because there would have been no expectation that an organic acid salt would have performed effectively when heated for the reasons stated on page 7 of the Appeal Brief. We are unpersuaded by such argument because absent supporting evidence, Appellant's assertion amounts to a mere conclusory statement that is entitled to little, if any, probative weight. *See, e.g., In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997).

With regard to Appellant's arguments pertaining to Hammond (Appeal Br. 8–10; Reply Br. 3–4), we are unpersuaded by such arguments for the reasons provided by the Examiner in the record (Ans. 6). Therein, the Examiner adequately explains how Hammond teaches that both lactides and glucono-delta-lactones are acidogens that are capable of slowly hydrolyzing to form carboxylic acids, in food industry applications. Ans. 6. We are thus not persuaded of error in the Examiner's conclusion that it would have been obvious to have modified Newkirk by employing either glucono-delta-lactone or lactide, for the same purpose and function as disclosed by Hammond.

Appellant then refers to rebuttal evidence (evidence of unexpected and advantageous results), which we have carefully reviewed. Appeal Br. 10–11; Reply Br. 4–5. Appellant refers to Figure 1, Example 1, and the Tables, found in the Specification. Appeal Br. 10. Appellant states that this evidence supports the position that the particularly claimed combination significantly reduces bacterial numbers over time. *Id.* However, the burden rests with Appellant to establish, *inter alia*, (1) that the comparisons are to the disclosure of the closest prior art, and (2) that the supplied evidentiary

showing is commensurate in scope with the claimed subject matter. *See In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). In the instant case, Appellant has not adequately explained how the evidence meets these criteria, and we note that it is not within the province of the Board to independently review Appellant's data and ferret out possible evidence of unexpected results. On the contrary, the burden of establishing unexpected results rests squarely upon the party asserting them. *Klosak*, at 1088.

In view of the above, we thus affirm the rejection. However, because the Examiner has not addressed the rebuttal evidence in the same manner as set forth herein above (Final Act. 6; Ans. 7), we denominate our affirmance as involving a new ground of rejection pursuant to our authority under 37 C.F.R. § 41.50(b).

#### DECISION

The Examiner's decision is affirmed but a new ground of rejection is entered pursuant to our authority under 37 C.F.R. § 41.50(b).

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b), which provides that a "new ground 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 appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

- (1) Reopen prosecution. 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. . . .

(2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should the appellant elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection(s), the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellant elects prosecution before the Examiner and this does not result in allowance of the application, abandonment, or a second appeal, this case should be returned to the Patent Trial and Appeal Board for final action on the affirmed rejection, including any timely request for rehearing thereof.

#### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

AFFIRMED; NEW GROUND OF REJECTION