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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SEAN EICHENLAUB, JUSTIN FRENCH,
CHRISTOPHER JAMES KOH, and AUSTIN KOZMAN

Appeal 2017-000495
Application 13/866,706
Technology Center 3700

Before: CHARLES N. GREENHUT, MICHAEL L. HOELTER, and
BENJAMIN D. M. WOOD, *Administrative Patent Judges*.

WOOD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants¹ appeal under 35 U.S.C. § 134 from a rejection of claims 10 and 12–22. Final Act., Summary. Claims 1–9 have been withdrawn and claim 11 has been cancelled. App. Br. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

THE INVENTION

The claims are directed to a method, apparatus and system for producing a food product. Claim 10, reproduced below, is illustrative of the claimed subject matter:

10. A system for producing food pieces comprising:
 - a first immersion tank that receives food pieces into a first edible fluid;
 - a takeout conveyor that removes said food pieces from said first edible fluid as a product bed from said immersion tank, wherein said product bed comprises a product bed depth;
 - at least one transfer conveyor that reduces said product bed depth to substantially monolayered;
 - a second immersion tank that receives said food pieces from said at least one transfer conveyor in a second edible fluid; and
 - a draining belt that receives said food pieces from said second immersion tank, wherein said draining belt comprises a plurality of vertical orientation members, each of which are spaced a predetermined distance apart from an adjacent vertical orientation member, wherein the predetermined distance is less than a major diameter of the food pieces to prevent any of the

¹ Appellants state that the real party in interest is Frito-Lay North America, Inc. App. Br. 2.

food pieces from resting on an outer surface of the draining belt in a horizontal orientation.

REFERENCES

Smith	US 3,635,149	Jan. 18, 1972
Marmor	US 3,733,202	May 15, 1973
Desai	US 2010/0051419 A1	Mar. 4, 2010
Price	US 2012/0103764 A1	May 3, 2012
Herrmann	US 8,371,568	Feb. 12, 2013
Caridis	US 8,372,467	Feb. 12, 2013

REJECTIONS²

Claims 21 and 22 are rejected under 35 U.S.C. § 102(b) as anticipated by Marmor. Final Act. 3.

Claims 10, 12, 13, 19, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Desai, Caridis and Herrmann. *Id.* at 6.

Claims 14–18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Desai, Caridis, Herrmann, and Price. *Id.* at 10.

Claim 10 is rejected under 35 U.S.C. § 103(a) as unpatentable over Desai, Caridis, Marmor, and Smith. *Id.* at 12.

ANALYSIS

Claims 21 and 22—Anticipated by Marmor

Claim 21 requires, among other things, an immersion tank having a weir, and “a draining belt located beneath the weir.” App. Br. 28 (Claims App.). Claim 22 depends from claim 21. *Id.* The Examiner finds that Marmor’s vessel 10 corresponds to the claimed immersion tank, the slanted

² The Examiner withdrew a rejection of claims 10 and 12–22 under 35 U.S.C. § 112(a) or 35 U.S.C. § 112 (pre- AIA), first paragraph, as not enabled. March 16, 2016 Advisory Action, 2.

wall at the right side of the vessel corresponds to the claimed weir, and conveyor 30 corresponds to the claimed draining belt located beneath the weir. Final Act. 4 (citing Marmor, Fig. 1); *see* Marmor, 3:72–4:12.

According to the Examiner, “‘beneath’ means ‘below’ (e.g., it does not have to be entirely below),” and “a portion of draining belt [30] is located beneath the weir.” Ans. 17. Appellants disagree, asserting that Marmor’s conveyor 30 “*is actually located above the slanted wall.*” App. Br. 8 (citing Marmor, Fig. 1). Appellants’ Specification provides guidance on this point by describing a weir “wherein said fried food pieces and oil flow over said weir and onto said draining belt.” Spec. ¶ 9; *see also* Spec. ¶¶ 11, 14, 17, 37, 46, and 63.

We are not persuaded that Marmor’s conveyor 30 is located beneath the right-side slanted wall of Marmor’s vessel 10, as the Examiner finds. On the contrary, we agree with Appellants that, as is evident from Marmor Figure 1, conveyor 30 is located above the slanted wall that the Examiner contends corresponds to the claimed weir. The Examiner apparently reaches the opposite conclusion by comparing the elevation of only a left-side portion of the conveyor with the elevation of a laterally spaced right-side portion of the slanted wall, as depicted in Marmor Figure 1. Following this logic, one would unreasonably conclude that roof shingles are “beneath” the rafters of a pitched roof simply because a portion of the rafters have a higher elevation than a laterally spaced portion of the shingles. Because we are not persuaded that one of ordinary skill in the art would use such reasoning, we are not persuaded that Marmor teaches all of claim 21’s limitations, and thus we do not sustain the Examiner’s rejection of claims 21 and 22 as anticipated by Marmor.

*Claims 10, 12, 13, 19, and 20—
Unpatentable over Desai, Caridis and Herrmann*

The Examiner relies on the combination of Desai and Caridis to teach claim 10's first immersion tank, takeout conveyor, at least one transfer conveyor, second immersion tank, and draining belt. Final Act. 6–7 (citing Desai ¶ 17, Figs. 1, 6; Caridis, 1:63–2:6, Fig. 1A). The Examiner acknowledges, however, that these references do not teach that the draining belt comprises a plurality of vertical orientation members having the claimed spacing, and therefore relies on Herrmann to provide this teaching. *Id.* at 8 (citing Herrmann, Fig. 3). In response to Appellants' contention that Herrmann is non-analogous art (App. Br. 14), the Examiner asserts that "Herrmann et al. is used to teach orientation members in order to control the placement of object(s) at desired orientation and the method for controlling placement of objects is gear[ed] toward solv[ing] the same problem with which the applicant was concerned." Ans. 21.

We are not persuaded that Herrmann is analogous art, and decline to sustain this rejection. "Two criteria have evolved for determining whether prior art is analogous: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986). The Examiner appears only to rely on the second criteria. Ans. 21. "A reference is reasonably pertinent if . . . it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem." *In re Clay*, 966 F.2d 656, 659 (Fed. Cir. 1992). "Thus, the

purposes of both the invention and the prior art are important in determining whether the reference is reasonably pertinent to the problem the invention attempts to solve.” *Id.*

According to the Specification, the invention at issue “relates to an improved method and system for the production of a fried snack food,” and seeks to satisfy the need for “a process that enables the production of a fried food product such as a potato chip that has lower levels of oil than a traditionally fried food product, but that retains desirable organoleptical properties similar to traditional potato chips.” Spec. ¶¶ 1, 6. Thus, the problem that the invention addresses is fried food products absorbing too much oil. The invention addresses this problem in part by arranging vertical orientation members on the draining belt to prevent the fried food pieces from laying horizontally while draining of oil, thereby allowing the food pieces to drain evenly on both sides rather than having oil pool on one side and be absorbed into the chip. *Id.* ¶¶ 37–38.

Herrmann, on the other hand, relates to a “sheet transport system” for a “xerographic marking apparatus,” and seeks to solve the problem of “misregistration and skewing of the media stack” during transport. Herrmann, 1:5–13, 65–67. In other words, the problem Herrmann attempts to solve is edge misalignment of horizontally stacked sheets of paper that are smaller than the bins in which they are being transported. *Id.* at 1:65–2:6. Herrmann’s solution is to use “pushers” of different heights to create smaller bins within the larger bins, and an actuator means to guide the smaller sheets into the smaller bins to reduce “the scatter that is caused by” transportation. *Id.* at 2:7–16. As depicted in Figure 1 of Herrmann, the smaller sheets lay flat in the smaller bins and overhang each other, and as depicted in Figure 3

of Herrmann, the larger sheets rest at an angle on top of the lower pushers while also overhanging each other. Herrmann has nothing to do with the problem of less absorption of oil by food products, and more particularly arranging such products vertically on edge to promote drainage therefrom. Thus, we are not persuaded that Herrmann's teaching of registering horizontally stacked sheets would logically have commended itself to an inventor seeking to address such a problem.

Because we are not persuaded that Herrmann is analogous art, we do not sustain the rejection of claim 10, and its dependent claims 12, 13, 19, and 20.

Claims 14–18—Unpatentable over Desai, Caridis, Herrmann, and Price

The Examiner's rejection of claims 14–18 relies on the erroneous determination that Herrmann is analogous art. Price does not cure this deficiency. Therefore, for the reasons discussed above, we do not sustain the rejection of claims 14–18 as unpatentable over Desai, Caridis, Herrmann, and Price.

Claim 10—Unpatentable over Desai, Caridis, Marmor, and Smith

As above, the Examiner relies on the combination of Desai and Caridis to teach claim 10's first immersion tank, takeout conveyor, at least one transfer conveyor, second immersion tank, and draining belt. Final Act. 12–14. The Examiner further relies on Marmor to teach a draining belt with a plurality of vertical orientation members, and on Smith to teach a plurality of vertical orientation members spaced apart at a distance less than a major diameter of the food pieces. *Id.* at 14–15 (citing Marmor, Fig. 1; Smith, Figs. 1, 5–8). According to the Examiner, it would have been obvious to one of ordinary skill in the art to modify the combination of Desai, Caridis

and Marmor “with Smith’s vertical orientation members in order to provide non-adherent surface while supported on the pointed elements.” *Id.* at 15 (citing Smith, 1:64–68). Appellants respond, *inter alia*, that “the Examiner has attempted to support the combination of references with nothing more than an improper conclusory statement.” App. Br. 19. Appellants further assert that the Examiner provides “conflicting reasons” to combine Marmor and Smith. *Id.* at 21.

We agree with Appellants that the Examiner has not provided an adequate reason to combine Marmor and Smith. Specifically, whereas Marmor’s belt 30 removes cooked food pieces from the cooking fluid for draining, Smith’s conveyor 38 guides food pieces into the cooking fluid, with pointed elements supporting the food pieces to permit the cooking process to develop a “relatively nonadherent surface” on the food. Smith, 1:60–68, 2:10–13. It is not apparent why one of ordinary skill in the art would have used Smith’s pointed elements, which are useful at the beginning of the cooking process, on a belt that receives the food pieces only after they are cooked, where the pointed elements could not provide the benefit that would have purportedly motivated one of ordinary skill in the art to add them.

DECISION

For the above reasons, the Examiner’s rejection of claims 10 and 12–22 is reversed.

REVERSED