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EXAMINER
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JEFFERY M. MEYER[1]

Appeal 2017-003683
Application 14/476,913[2]
Technology Center 1700

Before JEFFREY T. SMITH, JAMES C. HOUSEL, and JANE E. INGLESE, *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 the final rejection of claims 1–3 and 5–11. We have jurisdiction under 35 U.S.C. § 6.

Appellant's invention relates generally to a dry spice/herb mixture for mixing with food. (Spec. ¶ 1). Claim 1 illustrates the subject matter on appeal and is reproduced from the Claims Appendix to the Brief.

> 1. A dry spice/herb mixture for admixing with a food, the dry spice/herb mixture comprising:

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[1] Jeffery M. Meyer is identified as the inventor of the appealed application.
[2] According to the Appeal Brief, the real party in interest is CJ's Premium Spices LLC. *See* (App. Br. 1).

> (a) a plurality of base ingredients including celery seeds, garlic granules, onion powder, paprika, and turmeric;
>
> (b) sugar, wherein said sugar comprises at least five times the combined weight of the celery seeds, garlic granules, onion powder, paprika and turmeric; and
>
> wherein the percentage weights of said plurality of base ingredients in said dry spice/herb mixture including celery seeds, garlic granules, onion powder, paprika and turmeric and of said sugar are, respectively .5 – 3.0; .5 – 3.0; .1 – 3.0; .1 – 3.0; .1 – 1.0; and 50 – 60.

Appellant (*see generally* App. Br.) requests review of the following rejections under 35 U.S.C. § 103(a):

(I) claims 1–3, 5 and 11 rejected as unpatentable over the combined teachings of Mager (WO 2012/006080 A1, pub: Jan. 12, 2012) in view of Kitchen Garden Gal of Chowhound, http://www.chowhound.com, last visited Mar. 17, 2017; Richelle et al. (US 2008/0193505 A1, pub: Aug. 14, 2008); Mannering, Using Herbs and Spices, http://extension.udel.edu/factsheets/using-herbs-and-spices/print/, last visited Mar. 17, 2016; FL: *Cheesy Herb Crackers*, Family Living: Hooray for Snacks & Leisure Arts, Leisure Arts-Cooking, p.11 (2011); DeSmidt et al. (US 2006/0034995 A1, pub: Feb. 16, 2006); Busch et al. (US 2010/0104733 A1, pub: Apr. 29, 2010), Zhang et al.(CN 102150729 A. pub:Aug. 17, 2008); Zhang et al. 2 (US 2007/0286912 A1, pub. Dec. 13, 2007); and Memphis Dust: A Magical Spice Rub, http://www.huffingtonpost.com/craig-goolwyn/memphis-dust-magical, last visited: July 8, 2016 (HP);

(II) claim 6 rejected as unpatentable over the prior art cited in the rejection of claims 1–3, 5 and 11, and further in view of SRS, Food Storage:

Storing Herbs and Spices for Long Term Storage, http://selfreliantschool.com/food-storage-storing-herbs-and-spices-for-long-term-storage/, last visited: Mar. 17, 2016;

(III) claims 7–9 rejected as unpatentable over the prior art cited in the rejection of claims 1–3, 5 and 11, and further in view of WHF, The World's Healthiest Foods Mustard Seeds, http://web.archive.org/20020820065318, last visited, Mar. 17, 2016, WHF2, The World's Healthiest Foods Dill Weed, Dried, http://web.archive.org/20020825065603, last visited, Mar. 17, 2016 WHF3, The World's Healthiest Foods Parsely, http://web.archive.org/2002082007119, last visited, Mar. 17, 2016; and

(IV) claim 10 rejected as unpatentable over the prior art cited in the rejection of claims 1–3, 5 and 11 and further in view of WHF, WHF2, WHF3, Hiron et al. (US 2004/000595, A1, pub: Jan. 8, 2004), BA, bon appetite, Dry Rub, http://www.bonappetit.com/recipe/dry-rub, last visited, Mar. 17, 2016 and Villota et al., (US 5,508,053 iss: Apr. 16, 1996). (Final Act. 20–27).

OPINION[3]

Upon consideration of the evidence in this appeal record in light of the respective positions advanced by the Examiner and Appellant, we determine that Appellant has not identified reversible error in the Examiner's determination that the subject matter recited in claims 1–3 and 5–11 would

[3] Appellant presents arguments for independent claim 1. (App. Br. 7–10). Appellant's arguments presented addressing rejections III and IV are substantially the same as those presented in addressing rejection I. (See generally App. Br.). We limit our initial discussion to independent claim 1 which we select as representative of the rejected claims.

have been obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103(a). Accordingly, we sustain rejections I–IV.

We have thoroughly reviewed each of Appellant's arguments for patentability. However, we are in complete agreement with the Examiner's reasoned analysis and application of the prior art, as well as the Examiner's cogent and thorough disposition of the arguments raised by Appellant. Accordingly, we will adopt the Examiner's reasoning as our own in sustaining the rejection of record, and we add the following for emphasis only.

The complete statement of the rejections on appeal appear in the Final Office Action. (Final Act. 2–*14).*

Rejections I, III and IV

The Examiner found Mager teaches nutritional compositions comprising a spice/herb mixture comprising seasonings and sugar for admixing with a food. Mager discloses the nutritional compositions are suitable for oral nutritional supplements and tube-feed formulations. (Mager, col. 1 ll. 17–24). While Mager fails to teach all the claimed ingredients in the spice/herb mixture, we concur with the Examiner that the additionally cited references establish the obviousness of incorporating the recited components in a nutritional composition (spice/herb mixture). For instance, Kitchen Garden teaches granulated or dried minced garlic and onion are not wet and harsh tasting; and Richelle teaches the suitability of forming dry spice/herb mixtures for admixing with food. (Final Act. 10–12). The

Examiner further determined that Mannering teaches varying the amounts of dry herbs and spices to vary the taste/flavor. (Final Act. 13).

Accordingly, based on the collective teachings of the applied prior art, we are in full agreement with the Examiner that it would have been obvious for one of ordinary skill in the art to formulate a dry spice/herb mixture containing the recited components for their art-recognized properties.

According to Appellant, the claimed invention is directed to a dry spice/herb mixture which—when applied to a food product—results in that food product having a creamy taste and good mouth feel. (App. Br. 5 citing Spec. ¶ 2). Appellant argues:

> [C]ombining ingredients in food recipes cannot be dismissed on the basis of a broad assertion that combining any or all known food ingredients is obvious. A proper §103 analysis requires a discussion of the issue of what ingredients are being combined, why, how much of each ingredient is included, and the purpose of it all. Here, in amended claim 1, very specific ranges for each of the ingredients and their amounts relative to each other and to the sugar ingredient are carefully and clearly specified.
> (App. Br. 5).

Appellant argues that the Examiner has cited nine references in the rejection and that there is no motivation or suggestion to combine the teachings of the references. (App. Br. 5).

Appellant's arguments substantially address the prior art cited in the rejection individually. The prior art cited by the Examiner establishes ingredients utilized in spice/herb mixtures are known to persons of ordinary skill in the art. Manifestly, the number of references cited in a rejection may be mandated by the number of conventional ingredients recited in a rejected claim. Moreover, as stated by Alan Swan in the Declaration, signed June 21, 2016, "Spice/herb mixtures for mixing with foods, are not novel, per se.

Hundreds of such spice/ herb mixtures have been introduced in the art over the years for making all kinds of foods including potato salad." (Declaration ¶ 3). It is well settled that it is a matter of obviousness for one of ordinary skill in the art to combine conventional ingredients in a food product, and to determine their optimum amounts, in the absence of evidence that the ingredients coact or cooperate in a manner to produce an unexpected result. *In re Levin*, 178 F.2d 945, 948 (CCPA 1949). While Appellant argues the amount of the various herbs/species specified in claim 1 "provides very unique quantities and ingredient ratios and those quantities affect not only the taste but also the consistency and mouth-feel as well." (App. Br. 7). In the present case, Appellant has not directed us to any evidence that the claimed ingredients combined to form a product having unexpected properties. Nor has Appellant argued that the claimed ingredients in the recited amounts achieve an unexpected result with respect to the method of preparation. Accordingly, the prima facie case of obviousness established by the Examiner stands unrebutted.

We are further unpersuaded by Appellant's arguments that the prior art does not render obvious utilizing sugar in an amount at least 5 times as much as the combined amount of the celery seeds, garlic granules, onion powder, paprika, and turmeric. (App. Br. 7). While the cited prior art does not disclose a range that explicitly overlaps or includes Appellant's particular claimed range for the content of sugar, the prior art does disclose a general teaching of spices and herbs including sugar restricting them as to the amount. (*See* e.g. Mager and Richelle). The Federal Circuit has held, that "where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine

experimentation." *In re Aller*, 220 F.2d 454, 456 (CCPA 1955); *see* also *In re Peterson*, 315 F.3d 1325, 1330 ("The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages."). This principle is particularly true for ingredients in food products. *See In re Levin*, 178 F.2d at 948 .

Appellant argues the Alan Swan Declaration, submitted pursuant to 37 CFR §1.132, establishes the product of the present invention is very well received and is developing ever-growing commercial success. (App. Br. 5).

The Swan Declaration including the Exhibits A–D is insufficient evidence to establish commercial success. *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (Appellant must offer proof that the asserted commercial success occurred in the relevant market and "that the sales were a direct result of the unique characteristics of the claimed invention—as opposed to other economic and commercial factors unrelated to the quality of the patented subject matter."); *Geo. M. Martin Co. v. Alliance Machine Systems Int'l LLC*, 618 F.3d 1294, 1304 (Fed. Cir. 2010) ("The commercial success of a product is relevant to the non-obviousness of a claim only insofar as the success of the product is due to the claimed invention.") The declaration does not indicate that the product sales information for any one of the 3 identified CJ's Premium Spices product were a result of the claimed dry spice/herb mixture. The Declaration fails to explain that the sales were the result of the unique characteristics of the claimed invention. The Declaration has also failed to identify the marketing and advertising conditions utilized for sales of this product.

In addition, the Declaration does not provide any other evidence establishing the increased sales of CJ's Premium Spices product, and establishing that sales of the CJ's Premium Spices product resulted directly from the merits of the claimed dry spice/herb mixture. In this regard, as discussed above, the Swan Declaration does not indicate the market in which the CJ's Premium Spices product containing the claimed dry spice/herb mixture was sold. Even assuming that this was the case, the Declaration does not indicate the level of sales of the CJ's Premium Spices product in the dry spice/herb product market, or the actual market share of the CJ's Premium Spices product in a given market. The Declaration does not indicate how this compares to other products in the dry spice/herb product market. The Declaration also does not specify the extent of advertisement employed for the CJ's Premium Spices product, i.e., below, above, or identical to a given industry norm.

Rejection II

Appellant argues "[t]he SRS reference is hardly relevant to the overall combination that is the subject of claim 6. Claim 6 is not directed to a dry canning process which is a special process involving an oven." (App. Br. 9).

We are not persuaded by Appellant's arguments. The prior art cited by the Examiner establishes it was known to use sealed bags for storing food. Consequently, a person of ordinary skill in the art would have reasonably expected the recognized techniques for storing items in sealed bags would have been suitable for storing a mixture of spices and herbs.

For the reasons stated above, and the reasons presented by the Examiner, we sustain the rejections of claims 1–3 and 5–11 under 35 U.S.C. § 103(a).

ORDER

The rejections of claims 1–3 and 5–11 under 35 U.S.C. § 103(a) are affirmed.

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

AFFIRMED