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Carstens & Cahoon, LLP PO Box 802334 Dallas, TX 75380			TRAN, LIEN THUY	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KEVIN C. COGAN¹
(Applicant: Frito-Lay North America, Inc.)

Appeal 2018-003318
Application 14/551,859
Technology Center 1700

Before BEVERLY A. FRANKLIN, N. WHITNEY WILSON, and
LILAN REN, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ Appellant identifies the real party in interest as Frito-Lay North America, Inc. Appeal Br. 2.

Appellant requests our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 1–24. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

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

1. A method of making a masa, the method comprising:
hydrating kernel corn;
grinding the hydrated corn; and
adding corn flour treated to deactivate enzymes therein to thereby make a masa comprised of hydrated ground corn and the added treated corn flour.

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

Gimmler	US 6,001,409	Dec. 14, 1999
Cardenas	US 2003/0198725 A1	Oct. 23, 2003
Xu	US 2012/0189756 A1	July 26, 2012

THE REJECTION

Claims 1–24 are rejected under 35 U.S.C. § 103 as being unpatentable over Cardenas in view of Xu and Gimmler.

ANALYSIS

To the extent that Appellant has presented substantive arguments for the separate patentability of any individual claim on appeal, we will address each separately consistent with 37 C.F.R. § 41.37(c)(1)(iv). We thus consider claims 1, 3, and 14 in this appeal.

Upon consideration of the evidence and each of the respective positions set forth in the record, we find that the preponderance of evidence supports the Examiner's findings and conclusion that the subject matter of Appellant's claims is unpatentable over the applied art. Accordingly, we sustain each of the Examiner's rejections on appeal for the reasons set forth in the Final Office Action and in the Answer (which we adopt as our own), and affirm. We add the following for emphasis.

Claims 1–24 are rejected under 35 U.S.C. § 103 as being unpatentable over Cardenas in view of Xu and Gimmler. We refer to pages 4-6 of the Answer regarding the Examiner's position for the rejection. The Examiner relies upon Cardenas for teaching a method of making masa dough which is used to form a corn-based snack product. The process comprises the step of hydrating a corn composition and milling the corn composition to form fresh dough. Cardenas, ¶¶ 0006, 0014, 0015, 0017, 0048, 0051. Ans. 4.

The Examiner states that Cardenas does not disclose adding corn flour treated to deactivate enzymes, the amounts of treated flour, and the treating temperature used for toasting to form the treated flour, as claimed by Appellant. The Examiner relies upon the secondary references for these teachings, discussed below. Ans. 4.

The Examiner finds that Gimmler teaches the use of a combination of a coarse corn component and a fine corn component. The Examiner finds that Gimmler teaches that the fine corn component creates a continuous phase which holds the product together and reduces breakage. This is the benefit for which the Examiner relies upon for making the combination. Ans. 4 and 5.

The Examiner recognizes that the combination of Cardenas in view of Gimmler does not teach the use of toasted corn flour in which the enzyme is deactivated. Ans. 5. The Examiner relies upon Xu for this teaching. Ans. 4–6. The Examiner finds that Xu teaches a stabilized whole corn flour having benefits including enhanced corn flavors such as sweet corn flavor, popcorn flavor, buttery flavor and toasted corn flavor. Ans. 4–5. The Examiner finds that the method comprises treating whole corn kernels with direct heat such as forced air at temperatures of about 230–280 °F, and grinding the heat-treated corn by hammer mill or attrition mill to desired granulation profile. The stabilized corn flour is substantially free of catalase activity. The flour can be used in a variety of food products to improve the total dietary fiber while maintaining or improving the taste of such food products. Xu, ¶¶ [0006], [0007], [0008], [0009], [0040], Ans. 4–5.

The Examiner concludes that it would have been obvious in view of the teaching of Gimmler to add corn flour to the process of Cardenas to obtain the benefits taught by Gimmler (the benefit being that the fine corn component creates a continuous phase which holds the product together and reduces breakage). The Examiner also concludes that it would have been obvious to use the toasted flour as taught in Xu to obtain the benefits, discussed *supra*, taught by Xu. Ans. 5.

We agree with the Examiner that a *prima facie* case of obviousness has been met. We have carefully reviewed Appellant’s position in the Appeal Brief and Reply Brief, and agree with the Examiner (Ans. 6–9) that arguments that address the references individually rather than as a combination are unpersuasive (*e.g.*, see Appeal Br. 10–11. Reply Br. 2). The test for obviousness is what the combined teachings of the references

would have suggested to those of ordinary skill in the art; one cannot show non-obviousness by attacking references individually where the rejections are based on combinations of references. *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097-98 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Sufficient motivation has been provided by the Examiner in the record in support of a *prima facie* case, not based on hindsight reconstruction as asserted by Appellants on page 11 of the Appeal Brief.

We also agree with the Examiner that the reason for the proposed modification need not be for the same purpose disclosed in Appellant's Specification. Ans. 9. "As long as some motivation or suggestion to combine the references is provided by the prior art taken as a whole, the law does not require that the references be combined for the reasons contemplated by the inventor." *In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992). Hence, Appellant's arguments that its purposes were different than those proposed by the Examiner are unpersuasive.

With regard to the temperature range recited in claims 3 and 14, we agree with the Examiner that Xu suggests the limitations in these claims as explained by the Examiner on page 9 of the Answer.

In view of the above, we are unpersuaded of error in the Examiner's rejection, and affirm.

DECISION

The rejection is affirmed.

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Application 14/551,859

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(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

ORDER

AFFIRMED