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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO.  | CONFIRMATION NO. |
|---|-------------|----------------------|----------------------|------------------|
| 12/639,882  | 12/16/2009  | Mark Gorris          | 157/1721US(1)        | 7655             |
| 22822   | 7590        | 02/04/2020           | EXAMINER             |                  |
| LEWIS RICE LLC<br>ATTN: BOX IP DEPT.<br>600 WASHINGTON AVE.<br>SUITE 2500<br>ST LOUIS, MO 63101 |             |                      | GEORGE, PATRICIA ANN |                  |
|   |             |                      | ART UNIT             | PAPER NUMBER     |
|   |             |                      | 1793                 |                  |
|   |             |                      | NOTIFICATION DATE    | DELIVERY MODE    |
|   |             |                      | 02/04/2020           | ELECTRONIC       |

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MARK GORRIS

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Appeal 2018-004209  
Application 12/639,882  
Technology Center 1700

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Before CATHERINE Q. TIMM, JEFFREY R. SNAY, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

SNAY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision rejecting claims 21–38. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42.

## BACKGROUND

According to Appellant, cinnamon may provide health benefits when ingested in an amount constituting a medicinal dose, which Appellant defines as “at least 1 gram consumed in a single instance.” Spec. 14. The subject matter on appeal relates to a food product containing a medicinal dose of cinnamon. *Id.* at 11. Sole independent claim 21 is illustrative and reproduced from the Claims Appendix of the Appeal Brief as follows:

21. A chewable consumable comprising:
- a medicinal dose of cinnamon, said medicinal dose comprising at least 1 gram and at least 2.5% of the total mass of said chewable consumable;
  - a fruit additive chosen from the group consisting of: fruit extract, fruit rind and combinations thereof, said fruit additive comprising at least 2.5% of the total mass of said chewable consumable;
  - a grain; and
  - an unrefined sweetener;
- wherein said chewable consumable is formed by said unrefined sweetener binding said cinnamon, said fruit additive, and said grain together without use of additional fat or chain proteins in said binding;
- wherein said chewable consumable comprises between about 16 to about 35 grams.

Appeal Br. 31 (Claims Appendix).

## REJECTIONS

- I. Claims 21, 24–27, 29–31, and 34–38 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Nair,<sup>2</sup> Su,<sup>3</sup> Kifaru,<sup>4</sup> and Parthasarath.<sup>5</sup>
- II. Claims 22, 23, and 28 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Nair, Su, Kifaru, Parthasarath, and Prosise.<sup>6</sup>
- III. Claim 32 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Nair, Su, Kifaru, Parthasarath, and Smidt.<sup>7</sup>
- IV. Claim 33 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Nair, Su, Kifaru, Parthasarath, and Cleveland.<sup>8</sup>

## OPINION

Appellant presents arguments addressing the Examiner’s rejection of claim 21, and does not separately argue any other claim. *See* Appeal Br. 29 (“Because all other currently pending claims in this case depend from claim 21, it is not necessary at this time for Appellant to address Examiner’s rejection of the dependent claims under 35 U.S.C. § 103(a).”). Accordingly, each rejection on appeal stands or falls with the rejection of claim 21.

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<sup>2</sup> US 2009/0004334 A1, published January 1, 2009.

<sup>3</sup> Lan Su et al., *Total phenolic contents, chelating capacities, and radical-scavenging properties of black peppercorn, nutmeg, rosehip, cinnamon and oregano leaf*, 100 Food Chemistry (2007) 990-997.

<sup>4</sup> <http://www.kifaruforums.net/archive/index.php/t-6034.html> (accessed by the Examiner on October 17, 2016).

<sup>5</sup> Chemistry of Spices, ed. Villupanoor A. Parthasarathy et al., CABI International 2008.

<sup>6</sup> US 2002/0012722 A1, published January 31, 2002.

<sup>7</sup> US 2007/0212433 A1, published September 13, 2007.

<sup>8</sup> US 2010/0113598 A1, published May 6, 2010.

With regard to claim 21, and relevant to Appellant's arguments on appeal, the Examiner finds Nair discloses chewable nutritional food products, such as nutrient bars and cookies, which include a medicinal dose of cinnamon. Final Act. 6. The Examiner finds Nair is silent with regard to use of sweetener as a binder for the food product, but that Kifaru teaches use of honey alone for binding a nutritional composition. *Id.* at 8. With regard to the recited cinnamon concentration, the Examiner finds Nair teaches providing cinnamon "for a host of benefits" and discloses a concentration range that overlaps that of claim 21. Ans. 16 (citing Nair ¶¶ 9, 25).

Appellant contends that while Nair discloses a concentration range for an admixture of ingredients which includes cinnamon, no such concentration range is disclosed for cinnamon alone. Appeal Br. 22 (citing Nair ¶ 25). Appellant further argues that one skilled in the art would not have selected a cinnamon concentration within the recited range "because one of ordinary skill in the art would understand that, due to the strong flavoring profile of cinnamon, cinnamon should not be added at such high percentages." *Id.* at 23. *See also* Reply Br. ii.

Appellant's arguments are not persuasive of reversible error. Nair states that the disclosed nutritional supplement can be formulated from four ingredients: soy, curcumin, at least one sweetener, and at least one so-called "additional ingredient." Nair ¶ 25. Nair identifies cinnamon as a suitable such additional ingredient, and teaches that the additional ingredient may be provided at about 0.1 to about 20 wt %. *Id.* The fact that Nair also discloses use of a cinnamon-containing admixture as a preferred additional ingredient (*id.*) is not apposite to Nair's alternative teaching of at least *one* additional ingredient, e.g. cinnamon.

Nor does Appellant persuasively argue that the claimed cinnamon concentrations would be beyond that which one skilled in the art would have considered in a nutritional product. Appellant presents no credible evidence in support of that contention. Conversely, the Examiner correctly finds that Nair identifies certain health benefits attributed to cinnamon. *See* Nair ¶ 9 (“Cinnamon . . . might provide a natural remedy against adult onset type II diabetes, lowering ‘bad’ LDL cholesterol, anti-blood clotting action, boosting brain function and alertness, treating colds and flu, and acting as a mild stimulant.”). Consistent with the disclosed health benefits, Nair states that ingredients such as cinnamon may be added “to provide pleasant taste, composition solubility, composition stability, *and/or additional nutritional benefits.*” *Id.* ¶ 48. Regardless of whether one of ordinary skill in the art would have understood Nair as disclosing cinnamon at a concentration as high as 20 wt. %, there is no dispute that Nair expressly identifies cinnamon as an ingredient intended to provide health benefits. As such, a preponderance of the evidence supports the finding that one of ordinary skill in the art would have had a reason to maximize the amount of cinnamon contained in the product. Appellant has not provided evidence that the recited concentration range would have exceeded that which would have been considered with a reasonable expectation of success for the known purpose of providing maximum health benefits.

Appellant also argues that Nair’s mention of “bakery items,” as cookies or nutrition bars, likely would have included eggs or oils that are precluded by the claim. Appeal Br. 25. Nair makes no mention of eggs or oils in the disclosed food products. Moreover, Kifaru provides evidence that it was known to use honey for binding nutritional bars, without use of eggs

or oils. In short, Appellant does not present persuasive evidence that any of the chewable consumable products listed in Nair necessarily would have included eggs or oils.

For the foregoing reasons, the Examiner's rejection of claim 21 is sustained. Because Appellant does not separately argue any of claims 22–38, the Examiner's rejections of these claims are sustained for the same reasons given in connection with claim 21.

### CONCLUSION

The Examiner's decision rejecting claims 21–38 is affirmed.

### DECISION SUMMARY

| <b>Claim(s)<br/>Rejected</b>   | <b>35 U.S.C.<br/>§</b> | <b>Reference(s)/Basis</b>                       | <b>Affirmed</b>                | <b>Reversed</b> |
|--------------------------------|------------------------|---|--------------------------------|-----------------|
| 21, 24–27,<br>29–31, 34–<br>38 | 103(a)                 | Nair, Su, Kifaru,<br>Parthasarath               | 21, 24–27,<br>29–31, 34–<br>38 |                 |
| 22, 23, 28                     | 103(a)                 | Nair, Su, Kifaru,<br>Parthasarath,<br>Prosise   | 22, 23, 28                     |                 |
| 32                             | 103(a)                 | Nair, Su, Kifaru,<br>Parthasarath, Smidt        | 32                             |                 |
| 33                             | 103(a)                 | Nair, Su, Kifaru,<br>Parthasarath,<br>Cleveland | 33                             |                 |
| <b>Overall<br/>Outcome</b>     |                        |   | 21–38                          |                 |

Appeal 2018-004209  
Application 12/639,882

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)(iv).

AFFIRMED