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Richards Rodriguez & Skeith LLP 816 Congress Avenue, Suite 1200 Austin, TX 78701			PRAKASH, SUBBALAKSHMI	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID JOHN FULTON

Appeal 2018-008840
Application 12/789,280
Technology Center 1700

BEFORE MICHELLE N. ANKENBRAND, DONNA M. PRAISS, and
JEFFREY R. SNAY, *Administrative Patent Judges*.

PRAISS, *Administrative Patent Judge*.

DECISION ON REHEARING

STATEMENT OF THE CASE

This decision on rehearing is in response to a Request for Rehearing (“Request”), dated September 26, 2019, of our Decision, dated July 26, 2019 (“Decision”), wherein we affirmed the Examiner’s decision to reject all of the appealed claims.

Appellant requests reconsideration of our affirmance of the rejection of claims 22, 25–27, 30–33, 36, 39–43, and 45–50 under 35 U.S.C. § 103(a) over Woestelandt, Zohoungbogbo, and Malby. Request 1–12.

We have reconsidered our Decision in light of Appellant’s comments in the Request for Rehearing, and we find no error in the disposition of the rejection.

A request for rehearing “must state with particularity the points believed to have been misapprehended or overlooked by the Board.” 37 C.F.R. § 41.52(a)(1). In the Request, Appellant argues the Examiner’s finding that Zohoungbogbo discloses a “substitute flour without gluten” is a critical link in the Examiner’s reasoning that it would have been obvious to substitute Zohoungbogbo’s flour for Woestelandt’s gluten-free wheat flour. Request 3–5. However, according to Appellant, Zohoungbogbo does not teach a “substitute flour without gluten.” *Id.* at 5.

Specifically, Appellant contends that Zohoungbogbo teaches a food composition including at least 50% of protein, up to 15% of carbohydrates, and from 35–50% of plant fibers. *Id.* Appellant further contends Zohoungbogbo expressly mentions that “[t]he proteins are preferably selected from the group comprising gluten, soya proteins, milk proteins in particular from soya milk without lactose, animal proteins obtained from meat or dried or smoked fish, egg albumen and yolk, wheat proteins, wheat germ, rice germ, soya bean protein, pea protein.” *Id.* at 5–6 (quoting Zohoungbogbo 2:35–50). Appellant argues that “not one of the ‘food compositions’ or ‘flours’ actually disclosed in *Zohoungbogbo* is ‘without gluten,’” and cites Zohoungbogbo’s Examples 1–7, which all include wheat gluten or wheat germ. *Id.* at 6–7. In summary, Appellant asserts “[w]hile *Zohoungbogbo* mentions several potential *ingredients* for its ‘food composition in the form of a flour,’ it does not teach or suggest *any* gluten-free *flour* comprising any of these ingredients.” *Id.* at 7–9.

With regard to Appellant’s argument regarding Zohoungbogbo’s examples, we note that “the disclosure of a reference is not limited to specific working examples contained therein.” *In re Fracalossi*, 681 F.2d

792, 794 n.1 (CCPA 1982). Appellant’s argument (Request 6) that Zohoungbogbo does not actually disclose a food composition or flour that is without gluten does not identify a fact that we misapprehended or overlooked. Request 6. The problem with Appellant’s argument is that “the question under 35 USC [§] 103 is not merely what the references expressly teach but what they would have *suggested* to one of ordinary skill in the art at the time the invention was made.” *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (quoting *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976)) (emphasis added). The correct inquiry is not whether Zohoungbogbo expressly discloses a flour without gluten (e.g., a flour including a protein that is without gluten), but rather, whether Zohoungbogbo’s disclosure, as a whole, would have taught or suggested a flour without gluten to one of ordinary skill in the art.

Here, the Examiner found Zohoungbogbo discloses a flour that is “without gluten.” Examiner’s Answer dated July 12, 2018 (“Ans.”) 5. To support this finding, the Examiner explained that Zohoungbogbo discloses a flour comprising at least 50% protein, less than 15% carbohydrates, and 35–50% plant fibers and cited the list of proteins Zohoungbogbo discloses that Appellant cites in the Request. *Id.* at 13; Request 5. The Examiner then explained that the health reasons for reducing gluten content, reducing carbohydrate content, and increasing fiber content in baked goods are “well established in the food and nutritional art.” Ans. 13. The Examiner reasoned that one looking to produce a gluten free baked product having a very low carbohydrate content would have considered substituting Zohoungbogbo’s low carbohydrate flour “having a protein other than wheat gluten” for Woestelandt’s wheat flour. *Id.* In other words, the Examiner

found Zohoungbogbo's list of proteins includes proteins without gluten (e.g., rice).

Appellant did not dispute that Zohoungbogbo's list of proteins includes non-gluten proteins. In fact, as noted in the Decision, Appellant acknowledges that Zohoungbogbo discloses non-gluten proteins. Decision 8; Appeal Brief filed February 27, 2018 ("Appeal Br.") 25 ("It is true that *Zohoungbogbo* identifies other non-gluten proteins as flour ingredients."). Furthermore, the Examiner provided reasoning in the Examiner's Answer why one of ordinary skill in the art would have selected a non-gluten protein for Zohoungbogbo's low carbohydrate flour.¹ Appellant did not dispute or otherwise challenge this reasoning by the Examiner.² As a result, Appellant did not identify a reversible error in the Examiner's finding that Zohoungbogbo taught a flour without gluten.

Appellant contends we erred by relying on the teachings of Appellant's application to buttress the conclusion of obviousness. Request

¹ Appellant asserts that the Examiner's conclusion to substitute Zohoungbogbo's flour for Woestelandt's is based on an assumption that the substitution is a simple one of one known element for another to obtain predictable results. Request 4–5. The Examiner's explanation in the Answer, however, demonstrates this was not necessarily the case.

² Appellant argues that the Examiner does not explain how the combination was supposed to work or how there would have been a reasonable expectation of success in making the claimed invention when Woestelandt's teaches a dough having eggs as the sole source of water, but Zohoungbogbo's flour includes gluten and water. Request 26. The general allegation that Zohoungbogbo's flour includes gluten does not address the Examiner's explanation at page 13 of the Examiner's Answer. Further, both the Examiner's Answer (Ans. 5, 9, 14) and the Decision (Decision 10–11) addressed the water content issue.

7–8 (citing Decision 8). Appellant further asserts we did not provide articulated reasoning with a rational underpinning why Zohoungbogbo’s identification of rice as a protein ingredient would have induced one of ordinary skill in the art to combine the teachings of Zohoungbogbo and Woestelandt with a reasonable expectation of success. *Id.* at 11.

As noted above, the Examiner found Zohoungbogbo discloses non-gluten proteins, a fact that Appellant acknowledged in the Appeal Brief. The Examiner also explained why one of ordinary skill in the art would have selected a non-gluten protein from Zohoungbogbo’s list of proteins. Thus, to the extent Zohoungbogbo does not expressly disclose a non-gluten flour, as Appellant argued, the Examiner explained adequately why Zohoungbogbo’s disclosure suggests such a flour. Therefore, our citation to the Background section of Appellant’s Specification was merely additional support in the record for the Examiner’s undisputed finding that Zohoungbogbo’s list of proteins includes non-gluten proteins (e.g., rice).

Appellant also argues one of ordinary skill in the art would have avoided a combination that included rice because Appellant’s Specification states that substantial portions of flours used as a substitute for wheat flour, including rice flour, are starch carbohydrates that are digested into glucose. *Id.* at 9–10. Appellant contends the invention is directed to low-starch baked goods and doughs, and the Board and Examiner failed to show that one of ordinary skill in the art would have had a reasonable expectation of success in achieving a low-starch baked food product using rice flour. *Id.* at 10–11.

As discussed above, Zohoungbogbo discloses a list of proteins for its flour that includes, among other proteins, rice. Decision 8 (citing Zohoungbogbo 2:35–40). However, as explained in the Decision,

Zohoungbogbo discloses that the carbohydrate content of its flour is “advantageously less than 5%.” Decision 12 (quoting Zohoungbogbo 2:31–34). Therefore, Zohoungbogbo’s disclosure would have provided a reasonable expectation of success for making a low-starch product using Zohoungbogbo’s flour.

In sum, we do not find persuasive Appellant’s argument that our Decision misapprehends Zohoungbogbo’s teachings. Thus, we decline to modify our decision affirming the Examiner’s rejection of the appealed claims.

Based on the foregoing, Appellant’s Request is denied with respect to making changes to the final disposition of the rejection raised therein.

This Decision on the Request for Rehearing incorporates our Decision, mailed July 26, 2019, and is final for the purposes of judicial review. *See* 37 C.F.R. § 41.52(a)(1).

Outcome of Decision on Rehearing:

Claims(s) Rejected	35 U.S.C. §	Reference(s)/Basis	Denied	Granted
22, 25–27, 30–33, 36, 39–43, 45– 50	103(a)	Woestelandt, Zohoungbogbo, Malby	22, 25–27, 30–33, 36, 39–43, 45– 50	

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)(v)(2010).

DENIED