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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PETER SEBASTIAN SLUSARCZYK, TRACEY DIANNE
ZIENER, YIJUN WANG, and FRANCIS S. SHIELDS

Appeal 2019-001483
Application 12/163,684
Technology Center 1700

Before JEFFREY T. SMITH, MICHAEL P. COLAIANNI, and
GEORGE C. BEST, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 36, 38–41, and 43–47. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Mars, Incorporated. Appeal Br. 2.

Appellant's invention is directed to food products comprising one or a plurality of surface pockets (Spec. ¶ 1; Claim 36).

Claim 36 is representative of the subject matter on appeal:

36. A pet food product comprising:

(i) a base pet food material having a plurality of surface pockets provided in the base pet food material and on opposing sides of the pet food product, no two surface pockets being in communication with each other; and

(ii) one or more filling food materials deposited in at least one of the surface pockets, the filling food material not being longitudinally continuous through the interior of the pet food product;

wherein all of the one or more filling food materials consist of an uncooked liquid or paste as deposited within the at least one surface pocket, the one or more filling food materials are resident within the surface pocket(s) within which the one or more filling food materials are deposited and wherein the filling food material is not flowable in the pet food product.

Appellant appeals the following rejections:

1. Claims 36, 38–40, and 43–47 are rejected under 35 U.S.C. § 103 as unpatentable over Lynnette (Lynnette, *Dog Recipes That Work Great in KONG Toys!*, *The Fun Times Guide of Dogs*, (accessed Feb. 10, 2006), (available at http://web.archive.org/web/20070207232947/http://dogs.thefuntimesguide.com:80/2006/02/dog_recipes_for_kong_chew_toys.php)) in view of Armando (US 4,539,211 issued Sept. 3, 1985), Markham (US 5,947,061 issued Sept. 7, 1999), Tepper (US 2004/0126462 A1 published July 1, 2004), and Canine Food Training (Norma Bennett Woolf, *Canine Food Training, Dog Owner's Guide*, (accessed Sept. 20, 2016), (available at

<http://web.archive.org/web/20070402081105/http://www.canismajor.com/dog/foodtrn.html>)).

2. Claims 36, 38–40, and 43–47 are rejected under 35 U.S.C. § 103 as unpatentable over Unlu (US 2006/0188611 published Aug. 24, 2006) in view of Kazemzadeh (US 6,009,663 issued Jan. 4, 2000), Lynnette, Markham, and Tepper.
3. Claim 41 is rejected under 35 U.S.C. § 103 as unpatentable over Lynnette in view of Armando, Markham, Tepper, Canine Dog Training, Cross (US 2002/0090421 A1 published July 11, 2002), and Levin (US 2003/0168020 A1 published Sept. 11, 2003).
4. Claim 41 is rejected under 35 U.S.C. § 103 as unpatentable over Unlu in view of Kazemzadeh, Lynnette, Markham, Tepper, Cross, and Levin.

Appellant argues claims 36 and 43 separately with regard to rejections (1) and (2) (Appeal Br. 8–13). Appellant relies on arguments made regarding claim 36 in the rejections of claim 41. Therefore, any claim not argued separately will stand or fall with our analysis of the rejection of claim 36.

FINDINGS OF FACT & ANALYSIS

The Examiner’s findings and conclusions regarding the rejection of claim 36 over Lynnette in view of Armando, Markham, Tepper and Canine Food Training are located on pages 4 to 5 of the Answer.

Appellant argues that none of the cited references taken alone or in combination teach or suggest each and every recitation of the pending claims

(Appeal Br. 8). Appellant contends that Lynette does not disclose positioning a filling food in a surface pocket of an edible base material (Appeal Br. 8). Appellant argues that Lynette positions the food in an inedible hollow rubber toy, not an edible base material (Appeal Br. 8). Appellant contends that Lynette teaches heating the peanut butter or cheese to make it more flowable and so the filling is not uncooked (Appeal Br. 8). Appellant contends that Lynette's peanut butter and Cheerio® mixture constitutes the filling; the Cheerios® are not base food material (Appeal Br. 8). Appellant contends that Cheerios® in the peanut butter means that the peanut butter does not consist of a liquid or a paste (Appeal Br. 8). Appellant contends that Lynette's Cheerios® have a through hole, not a surface pocket (Appeal Br. 9). Appellant argues that pet owner would not have prepared the Cheerios® and peanut butter mixture individually (Appeal Br. 9).

Regarding the Armando reference, Appellant argues that Armando's filling is a multi-texture and includes dried fruits and nuts (Appeal Br. 9). Appellant contends that Armando does not teach a filling that consists of a liquid or paste (Appeal Br. 9). Appellant contends that there is no motive based on Armando and Lynette to use a paste as a filling on base food material with a surface pocket (Appeal Br. 10). Appellant argues that Armando does not teach surface pockets on opposing sides of the product (Appeal Br. 10). Appellant contends that the Examiner provides no citation for the definition of pocket as "a cavity containing a deposit" (Appeal Br. 10). Appellant contends that Merriam-Webster's online dictionary defines pocket as "a small enclosure open at the top *or* side thereof" (Appeal Br. 11). Appellant argues that Armando's X-shaped cereal piece provides a

shelf for depositing a dried fruit mixture, but not a surface pocket as claimed (Appeal Br. 11).

Appellant contends that Markham's disclosures are directed to an inedible toy (Appeal Br. 11). Appellant argues that Tepper does not teach a base food material because the rawhide is not a food material (Appeal Br. 11). Regarding claim 43, Appellant argues that Markham teaches a dried piece of pet food extending from a cavity in an inedible toy (Appeal Br. 11). Appellant contends that Markham does not teach a paste extending beyond the surface of Markham's inedible toy (Appeal Br. 11).

We have considered all the Appellant's arguments and we find them unpersuasive of reversible error. The Examiner finds that Tepper teaches that surface pockets of a base pet food where the surface pockets having a filling of uncooked liquid or paste (Ans. 17). The Examiner finds that Tepper teaches an edible, chewable material formed in three-dimensional body and having pockets filled with an edible filling (Ans. 17). The Examiner finds that Tepper's surface pockets could be considered opposed (Ans. 17). Tepper teaches that the filling for the cavities formed in the pet chew can be peanut butter (§ 19). The preponderance of the evidence supports the Examiner's finding that "Tepper is also seen to teach and suggest surface pockets of a base pet food, where the surface pockets have a filling that consists of an uncooked liquid or paste" (Ans. 17).

Tepper's teachings are not limited to using rawhide as the base material. Rather, Tepper teaches that the chewable material may be made of rawhide, starch, casein, denatured and partially hydrolyzed collagen, thermoplastic materials among other materials (§ 37). Tepper teaches that the pet chew is an edible, chewable material (§ 20). Tepper plainly teaches

that the materials of the chew are edible. Tepper's disclosure comports with Appellant's description of suitable base food material as being "a cereal based component and/or a protein source" because casein is milk protein and starch is a component of cereal. *See Spec.* ¶ 40. Tepper's teachings alone and in combination with Lynnette, Armando, and Markham would have suggested the subject matter of independent claims 36 and 47.

Claim 43 depends from claim 36 and recites "wherein at least a portion of the one or more filling food materials in at least one surface pocket extend beyond the surface of the base pet food material."

Regarding claim 43, Appellant argues that Markham teaches a dried piece of pet material extending from a cavity (Appeal Br. 11). Appellant argues that Tepper's disclosure in paragraph 48 about the extension of the meat plug above the rawhide surface is being combined with other embodiments without any support to do so (Appeal Br. 12). The Examiner finds that "Markham teaches and suggests varying the depth and filling can allow an animal with different degrees of difficulty in accessing the treat, such that having the filling extend beyond the surface of the pocket would have been obvious for this same purpose" (Ans. 18). In other words, one of ordinary skill in the art would have understood that the extension of the peanut butter outside of Tepper's receptacles 14 (i.e., surface pockets) would have been obvious in order to provide the pet with different degrees of accessing the treat. Appellant does not dispute or otherwise show error with this finding. *See Reply Brief generally.*

Appellant contends that picking and choosing the various teachings in the references is improper in a § 103 rejection (Appeal Br. 12). Contrary to Appellant's argument, picking and choosing is proper for a § 103 rejection

but is improper for a § 102 rejection. *In re Arkley*, 455 F.2d 586, 587–88 (CCPA 1972) (“Such picking and choosing may be entirely proper in the making of a 103, obviousness rejection, where the applicant must be afforded an opportunity to rebut with objective evidence any inference of obviousness which may arise from the *similarity* of the subject matter which he claims to the prior art, but it has no place in the making of a 102, anticipation rejection.”).

Regarding rejection (2), Appellant argues that Unlu does not teach that the product is longitudinally continuous through the interior of the pet food product (Appeal Br. 13). Appellant contends that Kazemzadeh is limited like Armando to using edible fragments as part of the filling material and not a filling that consists of a paste or liquid (Appeal Br. 13).

Appellant’s arguments regarding rejection (2), are unpersuasive for the same reasons as rejection (1). Specifically, rejection (2) includes the disclosure of Tepper, which we find the Examiner has established would have suggested the limitations of claim 36 as discussed above (Ans. 16–17). The Examiner relies on Unlu and Kazemzadeh to teach the positioning of the surface pockets on opposite sides of the pet base food material (Ans. 20). The Examiner’s ordering of the references as Unlu being the primary reference is of no significance, but rather a matter of mere exposition of the rejection. *In re Bush*, 296 F.2d 491, 496 (CCPA 1961).

On this record, we affirm the Examiner’s § 103 rejections (1) to (4).

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
36, 38–40, 43–47	§ 103	Lynnette, Armando, Markham, Tepper, Canine Food Training	36, 38–40, 43–47	
36, 38–40, 43–47	§ 103	Unlu, Kazemzadeh, Lynnette, Markham, Tepper	36, 38–40, 43-47	
41	§ 103	Lynnette, Armando, Markham, Tepper, Canine Food Training, Cross, Levin	41	
41	§ 103	Unlu, Kazemzadeh, Lynnette, Markham, Tepper, Cross, Levin	41	
Overall Outcome			36, 38–41, 43–47	

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).

AFFIRMED