



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/917,902	06/14/2013	John E. Fannon	ABI0005-201-US	5016
101272	7590	02/11/2020	EXAMINER	
GLOBAL PATENT GROUP - ABI			GWARTNEY, ELIZABETH A	
2275 Cassens Drive			ART UNIT	
SUITE 118			PAPER NUMBER	
St. Louis, MO 63026			1791	
			NOTIFICATION DATE	
			DELIVERY MODE	
			02/11/2020	
			ELECTRONIC	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

admin@globalpatentgroup.com
lwilson@globalpatentgroup.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN E. FANNON and KENT R. ANDERSON

Appeal 2019-001604
Application 13/917,902
Technology Center 1700

Before CATHERINE Q. TIMM, LINDA M. GAUDETTE, and
DEBRA L. DENNETT, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 4–15, and 28–36. *See* Final Act. 1. 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 Allied Blending LP. Appeal Br. 1.

The claims are directed to a cheese anticaking agent composition (*see, e.g.*, claim 1), a method of treating a divided or shredded cheese food product with the anticaking agent composition (*see, e.g.*, claim 31), and a method of reducing browning of a divided or shredded cheese food product (*see, e.g.*, claim 32). All of the claims require the anticaking agent composition be substantially free of metal carbonate. Claim 1, reproduced below, is illustrative:

1. A cheese anticaking agent composition substantially free of cellulose and metal carbonate, comprising 70-90% starch by weight and 10-30% fat or fat replacement by weight.

Appeal Br. 7 (Claims Appendix).

The Examiner rejects claims 1, 4–15, 21 and 28–36 under 35 U.S.C. § 112(a) or 35 U.S.C. § 112 ¶ 1 (pre-AIA) as failing to comply with the written description requirement. Final Act. 2–3; Ans. 3.

OPINION

The Examiner finds that there is no support in the original disclosure for excluding metal carbonate, generally. Final Act. 3.

Appellant contends that the Specification, as originally filed, supports the negative limitation “by describing alternative compositions that are substantially free of metal carbonates, and by implying reasons why to exclude it.” Appeal Br. 4 (citing Spec. ¶¶ 35, 45, and 47–54). To support the argument that the written description implies a reason for excluding metal carbonate, Appellant points to a patent publication to Ang et al.²

² Ang et al., US 2004/0109927, published June 10, 2004 (Ang).

Appellant has not identified a reversible error in the Examiner's finding of lack of written descriptive support for the negative limitation "substantially free of . . . metal carbonate."

In determining whether the written description requirement is met, we consider "whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

First, we agree with the Examiner that the disclosure of Ang is not particularly germane to the issue before us. Ans. 5. Appellant reproduces a portion of Ang's paragraph 2, which describes a problem of unwanted gas release that occurs when calcium carbonate and other carbonate-based compositions are used as anticaking agents. Appeal Br. 5. Appellant's written description, however, fails to allude to this gas release problem, or any other problem associated with using metal carbonates in anticaking agents. The written description "test requires an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art" and "[b]ased on that inquiry, the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed." *Ariad*, 598 F.3d at 1351. Reading Appellant's Specification from the perspective of the skilled artisan, we find no persuasive evidence that Appellant understood the disadvantages of using metal carbonates in anticaking agents.

It is true that one way an applicant can support a claim with a negative limitation is by providing a "reason to exclude" in the Specification that does not necessarily articulate the advantages or disadvantages of each

feature. *Inphi Corp. v. Netlist, Inc.*, 805 F.3d 1350, 1355 (Fed. Cir. 2015). But Appellant does not provide such a reason to exclude metal carbonate either expressly or impliedly. Nor does the Specification describe metal carbonates as an “alternative feature.” Such “alternative features” must be positively recited in the written description. *See id.* at 1357 (“[P]roperly described, alternative features are sufficient to satisfy the written description standard.” (emphasis added)), and 1356 (quoting MPEP § 2173.05(i) (“If alternative elements are positively recited in the specification, they may be explicitly excluded in the claims.”))).

That the ordinary artisan would not understand the written description as describing metal carbonates as an alternative feature is clear from the Specification. The written description describes that the invention “is an improved anticaking product for use on cheese, especially in the pizza pie industry.” Spec. ¶ 8. The anticaking agent “promotes the melt of cheese, reduced browning, and improves flavor and texture.” Spec. ¶ 9. In addition to “starch loaded with a fat or fat replacement,” it can further comprise a calcium compound and the Specification discloses a list of possible calcium compounds including calcium carbonate. Spec. ¶¶ 11, 25, 35, 46. Thus, the Specification contemplates using calcium carbonate, but there is no mention of metal carbonates other than calcium carbonate or metal carbonates generally. Other ingredients are contemplated such as processing aids and flow agents, but metal carbonates are not mentioned as part of this group. Spec. ¶¶ 37–38.

Appellant states that every exemplified embodiment from paragraphs 47 to 54 is substantially free of metal carbonates. Appeal Br. 4. In fact, Table 1 is devoid of any mention of metal carbonate. Spec. ¶ 47. Some

examples include calcium sulfate along with starch and fat. *Id.* But the examples are not so exhaustive of the potential species of anticaking compositions that the ordinary artisan would have concluded that metal carbonates are described as present or excluded. “An amended claim that defines a subgenus of an originally claimed genus is not supported unless it was itself described in the application as filed.” *In re Welstead*, 463 F.2d 1110, 1113–14 (CCPA 1972); *see also In re Johnson*, 558 F.2d 1008, 1017–19 (CCPA 1977) (finding support for a claim to a “limited genus” with a negative limitation excluding two species *positively recited* in the written description).

Moreover, the concept of forming a cheese anticaking agent composition “substantially free” of metal carbonate is not reasonably conveyed by the written description. *See In re Anderson*, 471 F.2d 1237, 1244 (CCPA 1973) (“The question, as we view it, is not whether ‘carrying’ was a word *used* in the specification as filed but whether there is *support* in the specification for employment of the term in a claim; is the concept of carrying present in the original disclosure?”). “Substantially” conveys the concept that some amount may be present and the composition would still be “substantially free.” Given the lack of disclosure regarding metal carbonates as a genus, we cannot say the concept of either including metal carbonates or creating an anticaking agent composition “substantially free” of them is reasonably conveyed in the written description.

CONCLUSION

The Examiner’s decision to reject claims 1, 4–15, and 28–36 is affirmed.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 4-15, 28-36	112(a)	Written description	1, 4-15, 28-36	

TIME PERIOD FOR RESPONSE

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