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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DERWIN G. HAWLEY, EDWARD D. HOWEY,
WILLIAM H. CLEAVER, LYNN C. HAYNES, DESIREE S. BRAMBLE,
NING ZHOU, BIN ZHAO, TIMOTHY S. HANSEN,
DOMENICO R. CASSONE, and SARWAT GABRIEL

Appeal 2019-002504
Application 13/985,712
Technology Center 1700

Before JEFFREY T. SMITH, MERRELL C. CASHION, JR., and
JANE E. INGLESE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–15, 17, 18, 49, and 50. 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. The real party in interest is Intercontinental Great Brands LLC and whose parent corporation is Intercontinental Brands LLC, whose parent corporation is Mondelez Global LLC, whose parent corporation is Mondelez International, Inc. (Appeal Br. 3).

STATEMENT OF THE CASE

Appellant's invention is generally directed to a method of production of a stabilized whole grain flour that is less susceptible to rancidity development and has increased shelf stability than whole grain flours produced by conventional methods. (Appeal Br. 10). Claim 1 illustrates the subject matter on appeal and is reproduced below:

1. A method for the production of stabilized whole grain flour comprising:
 - a) milling whole grains to obtain a separate endosperm fraction, a separate fine bran and germ fraction, and a separate coarse bran and germ fraction, wherein said endosperm fraction has a particle size distribution of 0% by weight greater than 500 microns and less than or equal to about 20% by weight greater than 210 microns and an ash content of about 0.5 wt. % to about 0.6% wt. %, said fine bran and germ fraction has a particle size distribution of less than or equal to about 15% by weight greater than 500 microns and less than or equal to about 40% by weight greater than 210 microns and an ash content between 0.6 wt. % and about 2.0 wt. %, and said coarse bran and germ fraction has a particle size distribution of at least 75% by weight greater than 500 microns, from about 10% to about 25% by weight having a particle size between 149 microns and 500 microns and less than or equal to about 10% by weight having a particle size of less than 149 microns and an ash content of above 2 wt. %, and
 - b) grinding said separate coarse bran and germ fraction without grinding said fine bran and germ fraction to obtain a ground coarse bran and germ fraction having a particle size distribution of less than or equal to about 15% by weight greater than 500 microns and less than or equal to about 40% by weight greater than 210 microns,

c) combining and stabilizing said fine bran and germ fraction and said ground coarse bran and germ fraction to obtain a stabilized fine bran and germ fraction having a particle size distribution of less than or equal to about 15% by weight greater than 500 microns and less than or equal to about 40% by weight greater than 210 microns, and

d) combining said stabilized fine bran and germ fraction with said endosperm fraction to obtain a stabilized whole grain flour having: a particle size distribution of 0% by weight of particles greater than 500 microns, from about 5% to about 15% by weight of particles greater than 250 microns, from about 10% to about 20% by weight of particles greater than 210 microns, less than or equal to about 25% by weight of particles greater than 149 microns but less than 250 microns, and from about 65% to about 85% by weight of particles sized less than 149 microns,

wherein said fine bran and germ fraction is from 3% by weight to 15% by weight, and a lipase activity of less than 250 units/gram (U/g) of the stabilized whole grain flour, where a unit is a number of micromoles of 4-methylumbelliferyl heptanonate hydrolyzed per hour per gram.

Appellant requests review of the Examiner's rejection of claims 1–15, 17–18, and 49–50 under 35 U.S.C. § 103(a) as unpatentable over Gingras et al. (US 2009/0155439 A1, published June 18, 2009) (“Gingras”) in view of Sanchez et al. (EP 2 127 525 A1, published December 2, 2009) (“Sanchez”). (Appeal Br. 9; Final Act. 2–5).

OPINION

Upon consideration of the evidence in this appeal record in light of the respective positions the Examiner and Appellant advance, we determine that Appellant has not identified reversible error in the Examiner's determination that the applied prior art would have rendered the subject matter recited in

claims 1–15, 17, 18, 49, and 50 obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103(a). Accordingly, we sustain the Examiner’s § 103(a) rejection of the above claims for the reasons set forth in the Final Action and the Answer. We add the following.

Appellant initially argues Gingras and Sanchez do not disclose or suggest a method of production of a stabilized whole grain flour resulting in a particle size distribution of the final flour as recited in claim 1.² (Appeal Br. 11–12.)

Appellant’s argument lacks persuasive merit for the reasons provided by the Examiner. (*See* statement of the rejection in the Answer and Final Act.)

The Examiner determines the combination of Gingras and Sanchez would have suggested to a person of ordinary skill in the art a method of production of a stabilized whole grain flour resulting in a particle size distribution of the final flour as required by independent claim 1. (Final Act. 2–5.) The Examiner finds Gingras discloses a method of forming stabilized whole grain flour comprising milling wheat into the endosperm stream and the bran/germ stream. (Final Act. 2; Gingras ¶¶13, 28, 33.) Gingras discloses stabilization of bran material is achieved by inactivation of lipase enzyme in the bran/germ fraction. (Gingras ¶ 51.) The Examiner finds Gingras fails to disclose grinding the coarse bran fraction, the endosperm fraction, the final bran and germ fraction to have the particle size distribution as required by independent claim 1. (Final Act. 2.) The Examiner finds

² Appellant presents substantive arguments addressing claims 1–15, 17, 18, 49, and 50 together. Appeal Br. 10. We limit our discussion to independent claim 1 as representative of the subject matter on appeal.

Sanchez discloses a process for forming wheat flour including a bran fraction and an endosperm fraction. (Final Act. 3). The Examiner also finds that Sanchez separates the bran fraction into a fine bran portion having particles measuring about 200 microns and a coarse bran portion that is pulverized to a mean particle size of about 180 microns and then combining the two bran portions to form a single bran component with a particle size of 80–200 microns. (Final Act. 3; Sanchez ¶¶ 28–38.) The Examiner specifically states:³

The objective of Leo et al [Gingras] is form a whole wheat flour composition wherein the bran/germ fraction is stabilized so that the drawbacks of storage instability attributed by the bran/germ portion are avoided. Leo et al [Gingras] teach the bran/germ portion can be separated into fine and coarse fractions. It would have been obvious to one skilled in the art to ground the coarse fraction as taught by Sanchez et al so that all the separated fractions can have fine particle sizes when they are combined to form a whole grain flour composition. If the fine fraction already has a small particle size, it does not have to be ground again as taught by Sanchez. While Sanchez et al do not disclose the specific percentages and the sizes within the percentages as claimed, they teach an exemplified composition of whole grain with exemplified appropriate particle sizes. It would have been within the skill of one in the art to obtain specific amounts in specific size ranges depending on the degree of fineness and lacking of grittiness mouthfeel desired. Such parameter can readily be determined by one skilled in the art through routine experimentation. While Sanchez et al do not teach[] dividing the coarse fraction into first and second fraction, it would have been within the skill of one in the art to do so to ensure obtaining the desired sizes. In grinding and milling whole grain, it is well known to repeat the grinding and classifying operation to obtain the desired fractions and sizes.

³ We note that the Examiner misidentifies Gingras as Leo et al. in the noted quotation.

(Final Act. 4.)

It is well settled that the disclosure of a range in the prior art which substantially overlaps a claimed range is generally sufficient in and of itself to render the claimed range prima facie obvious. *See In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Wertheim*, 541 F.2d 257, 262 (CCPA 1976); *In re Malagari*, 499 F.2d 1297, 1302 (CCPA 1974). This is especially true here, where one having ordinary skill in the art would have been led to a method for the production of a stabilized whole grain flour wherein the flour has been separated into an endosperm fraction and course and fine bran fractions as suggested by the combination of Gingras and Sanchez and as determined by the Examiner. (Ans. 9.)

It is also well settled that where patentability is predicated upon a change in a condition of a prior art composition, such as a change in size, concentration or the like, the burden is on the applicant to establish with objective evidence that the change is critical, i.e., it leads to a new, unexpected result. *In re Woodruff*, 919 F.2d 1575, 1578 (Fed. Cir. 1990); *In re Aller*, 220 F.2d 454, 456 (CCPA 1955).

Appellant argues the claimed method reduces the release of oxidizing enzymes such as lipase and lipoxygenase which are released as a result of fine particle grinding or milling and contribute to the development of rancidity. (Appeal Br. 13)

Appellant's argument is not persuasive because this is the same objective achieved by the deactivation of the enzymes disclosed by Gingras. (Gingras ¶ 51.)

Appellant argues the Examiner has not properly considered the Declaration of inventor Lynn C. Haynes filed under 37 C.F.R. § 1.132 filed on June 14, 2017 (hereinafter, “Haynes I”). Appellant argues this declaration establishes

that the claimed three separate fractions and the claimed particle size distributions in each of the fractions are critical to the resulting measurable stability of the flour, and that the presently claimed method would not be obvious to one of ordinary skill in the art by the combination of Gingras and Sanchez as proposed in the Office Action.

(Appeal Br. 12)

We have considered Haynes I, but do not find it persuasive of establishing patentability of the appealed subject matter. Although factual evidence is preferable to opinion testimony, such testimony is entitled to consideration and some weight so long as the opinion is not on the ultimate legal conclusion at issue. While an opinion as to a legal conclusion is not entitled to any weight, the underlying basis for the opinion may be persuasive. *In re Chilowsky*, 306 F.2d 908, 916 (CCPA 1962). Some weight may be given to a persuasively supported statement of one skilled in the art on what was not obvious to him (*see In re Lindell*, 385 F.2d 453, 456 (CCPA 1967) and *In re Weber*, 341 F.2d 143 (CCPA 1965)). Here, Declarant Haynes has provided an opinion as to why the Examiner’s rejection is improper. Declarant Haynes indicates disagreement with the Examiner’s position that applicant has not established criticality or unexpected results with respect to the claimed three separate fractions and particle sizes. (Haynes I ¶ 5.) Declarant Haynes provides a discussion of the inventive method developed including the reduction and lipase activity

achieved. (Haynes I ¶¶ 6–9.) Declarant Haynes provides an opinion explaining why the rejection (office action) is improper. (Haynes I ¶¶ 10–18.) However, Declarant Haynes has not directed us to other evidence to support the opinion presented.

Appellant argues the Examiner has not properly considered the Declaration of inventor Lynn C. Haynes filed under 37 C.F.R. § 1.132 filed on August 6, 2018 (hereinafter, “Haynes II”). (App. Br. 12–20).

We have considered the Haynes II declaration, but do not find the evidence presented commensurate in scope with the claimed invention. Specifically, the Declaration does not show the size distribution of the samples. The declarant has indicated the comparison was of flours produced by the method of claim 1 compared to those that would have been expected by the proposed combination of Gingras and Sanchez. (Haynes II ¶ 9.)

The declaration fails to provide specific information as to the compositions, including particle sizes, resulting from the methods used to make them. We cannot determine from the evidence presented where the particles size distributions present in the tested flour compositions fall within the claimed range of particle size distributions. Therefore, we agree with the Examiner’s conclusion that the size distributions of the samples in the Haynes II Declaration are not commensurate in scope with the entire range of the respective size distributions claimed. (Ans. 12–13). A showing of unexpected results must be reasonably commensurate in scope with the degree of protection sought by the claims on appeal. *In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); *In re Clemens*, 622 F.2d 1029, 1035 (CCPA 1980). Declarant Haynes has also not provided an explanation as to why this limited showing of sample particle size distributions is representative of

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the entire scope of the claimed particle size distribution ranges of the invention. Under these circumstances, it cannot be said that the Appellant has demonstrated that the claimed subject matter achieves unexpected results relative to Gingras. *In re Freeman*, 474 F.2d 1318, 1324 (CCPA 1973).

For the reasons stated above and those presented by the Examiner we sustain the prior art rejection of claims 1–15, 17, 18, 49, and 50 under 35 U.S.C. § 103(a).

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–15, 17, 18, 49, 50	103(a)	Gingras, Sanchez	1–15, 17, 18, 49, 50	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136.

AFFIRMED