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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHIVAKUMAR ELAYEDATH, ZORAN TALIJAN, and
AARON P. WLASCHIN

Appeal 2019-005353
Application 14/441,200
Technology Center 1700

Before CATHERINE Q. TIMM, ROMULO H. DELMENDO, and
CHRISTOPHER C. KENNEDY, *Administrative Patent Judges*.

DELMENDO, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellant¹ appeals under 35 U.S.C. § 134(a) from the Primary Examiner's final decision to reject claims 1–4, 6–14, and 19–23.² 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—namely, “General Mills, Inc.” (Application Data Sheet filed May 7, 2015 at 5), which is also identified as the real party in interest (Appeal Brief filed February 28, 2019 (“Appeal Br.”) at 3).

² *See* Appeal Br. 4–12; Reply Brief filed July 3, 2019 (“Reply Br.”) at 1–6; Final Office Action entered October 15, 2018 (“Final Act.”) at 2–6; Examiner's Answer entered May 3, 2019 (“Ans.”) at 3–14.

I. BACKGROUND

The subject matter on appeal relates to a method for seasoning a cooked food product (e.g., a taco shell) and to a cooked food product formed by such a method (Specification filed May 7, 2015 (“Spec.”) ¶¶ 5–8). Representative claim 1 is reproduced from the Claims Appendix to the Appeal Brief, as follows:

1. A method of seasoning a cooked food product comprising applying a non-aqueous liquid seasoning mixture onto a surface of a cooked food product, ***the non-aqueous seasoning mixture comprising at least 35% wt solids***, wherein the applying step comprises spraying the non-aqueous liquid seasoning mixture onto the surface of the cooked food product with a spinning disc sprayer and wherein the spinning disc spray is provided in a spinning disc spray chamber having a product zone, said method further comprising:

receiving the non-aqueous liquid seasoning mixture in the product zone from the spinning disc sprayer; and
continuously moving the cooked food product through the product zone on a food product conveyor.

(Appeal Br. 13 (emphasis added)).

II. REJECTIONS ON APPEAL

The claims on appeal stand rejected under AIA 35 U.S.C. § 103, as follows:

A. Claims 1–4, 6–14, and 20–23 as unpatentable over Zimmerman et al.³ (“Zimmerman”) in view of Burns et al.⁴ (“Burns”) and *Saturn Spraying Systems: Introducing Spinning Disc*

³ US 6,352,730 B1, issued March 5, 2002.

⁴ US 2013/0259988 A1, published October 3, 2013.

*Technology*⁵ (“*Spinning Disc Technology*”); and

- B. Claim 19 as unpatentable over Zimmerman in view of Burns and *Spinning Disc Technology*, and further in view of Kelly et al.⁶ (“Kelly”).

(Ans. 3–14; Final Act. 2–6).

III. DISCUSSION

Rejection A. The Appellant provides various arguments under separate subheadings for: (1) claims 1, 2, 4, and 6–14; (2) claim 3; (3) claim 20; (4) claim 21; (5) claim 22; and (6) claim 23. We select claim 1 as representative of the claims listed under the first group pursuant to 37 C.F.R. § 41.37(c)(1)(iv). Therefore, we address claims 1, 3, and 20–23 on an individual basis, but claims 2, 4, and 6–14 stand or fall with claim 1.

(1) *Claim 1*

The Examiner finds that Zimmerman describes a method for seasoning a cooked food product including most of the steps recited in claim 1 (Ans. 4; Final Act. 2–3). The Examiner acknowledges, however, that “Zimmerman does not disclose receiving [a] suspension [of food additive ingredients and edible oil] in [a] product zone from [a] spinning disc sprayer and continuously moving the product through the product zone as in claim 1” (Ans. 4; Final Act. 3). To resolve this difference, the Examiner relies on the teachings found in Burns and *Spinning Disc Technology* (Ans. 5; Final Act. 3). Based on these findings, the Examiner concludes that a person

⁵ Retrieved from https://web.archive.org/web/20130623045141/https://www.saturnspraying.com/top_spray.html (June 23, 2013).

⁶ US 2005/0238782 A1, published October 27, 2005.

having ordinary skill in the art would have combined the references in the manner claimed by the Inventors because Zimmerman contemplates the use of conventional sprayers to apply the suspension and the implementation of a spinning disc sprayer as disclosed in Burns and *Spinning Disc Technology* to apply Zimmerman's suspension would have been obvious to a person having ordinary skill in the art as a matter of "[u]sing an alternative device to carry out the same function [disclosed in Zimmerman]" (*id.*). The Examiner explains further that "[o]ne would have been motivated to use the spinning disc sprayer for the advantages disclosed in [*Spinning Disc Technology*]" (*id.*).

The Appellant contends that a prima facie case of obviousness has not been established because Zimmerman discloses that flavors (i.e., flavoring components) are added in amounts of up to 1% by weight, whereas claim 1 requires the "seasoning mixture" itself to comprise "at least 35% wt solids" (Appeal Br. 5–6). According to the Appellant, "Zimmerman teaches away from higher amounts of seasoning by teaching that salts and seasonings can disadvantageously adhere to the food surface" (*id.* at 6). Furthermore, the Appellant argues that neither Burns nor *Spinning Disc Technology* teaches or suggests applying a mixture or seasoning mixture with a solids content of at least 35% by weight (*id.*). According to the Appellant, "there is no apparent reason to combine the references as set forth by the Examiner" because "Zimmerman specifically teaches advantages in the use of nozzles to spray an ingredient suspension on all sides of potato chips" while *Spinning Disc Technology* "teaches covering 'top only' or one side of a product" (*id.* at 6–7).

The Appellant’s arguments fail to identify reversible error in the Examiner’s rejection. *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011).

We start with claim interpretation. “During . . . original examination, the PTO must give claims their broadest reasonable construction consistent with the specification.” *In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007). Thus, “we look to the specification to see if it provides a definition for claim terms, but otherwise apply a broad interpretation.” *Id.* “As [our reviewing] court has discussed, this methodology produces claims with only justifiable breadth.” *Id.*; *see also Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2143, 2144–45 (2016) (the broadest reasonable interpretation standard “helps ensure precision while avoiding overly broad claims, and . . . help[s] members of the public draw useful information from the disclosed invention and better understand the lawful limits of the claim”).

Applying this standard, we agree with the Examiner’s position (Ans. 8–9) that the disputed claim limitation “the non-aqueous seasoning mixture comprising at least 35% wt solids,” as recited in claim 1, reads on Zimmerman’s suspension including, *inter alia*, flavoring components and having a “level of ingredient powder [of] less than 50%” (Zimmerman col. 13, ll. 1–13, 49–54; col. 15, ll. 22–24). The plain meaning of the disputed claim language would have informed one of ordinary skill in the relevant art that the Inventors were merely specifying the minimum total solids content of the “seasoning mixture”—not that all the solids in the seasoning mixture are made up, exclusively, of seasoning ingredients, as the Appellant would have us believe. In this regard, a “seasoning mixture” may reasonably be construed, in the present context, to mean any mixture that is used to season

a cooked food product—not a mixture that contains only solid seasoning ingredients and a non-aqueous liquid. The Appellant fails to direct us to any definition in the Specification that supports its proffered narrower interpretation. Hence, contrary to the Appellant’s teaching away argument, Zimmerman explicitly teaches the disputed claim limitation.

Having resolved the claim interpretation issue in the Examiner’s favor, we also agree with the Examiner’s finding that Zimmerman’s disclosure differs from claim 1’s subject matter only in that a spinning disc sprayer is not used to spray the suspension including flavoring components onto a cooked food product. Specifically, Zimmerman describes a method of adding food-additive ingredients to a food product comprising suspending the food-additive ingredients in a flowable edible fat, optionally heating the suspension to a flowable temperature, and applying the ingredient suspension in a controlled amount to the surface of a food product (Zimmerman col. 2, l. 66–col. 3, l. 15). Zimmerman discloses that the ingredient suspension includes not only a blend of powdered fat soluble vitamins but may also contain other solid and powdered ingredients such as flavoring components and vegetables (*id.* at col. 3, ll. 45–48; col. 13, l. 1–col. 14, l. 24). As discussed above, Zimmermann teaches that “[t]o maintain flowability, the level of ingredient powder is less than 50%” (*id.* at col. 15, ll. 22–24). According to Zimmerman, the suspension is applied to a wide variety of food products by, e.g., spraying (*id.* at col. 15, ll. 35–42; col. 20, l. 48–col. 21, l. 17).

Although Zimmerman does not specifically disclose “a spinning disc sprayer,” as recited in claim 1, we agree with the Examiner that Burns and *Spinning Disc Technology* provide the requisite motivation or reason to

implement such a device in Zimmerman. Burns teaches using a spinning disc to atomize and apply oil accurately and evenly onto all sides of a food product on which a batter is coated (Burns ¶¶ 13, 15, 20, 28). Significantly, *Spinning Disc Technology* discloses a spinning disc sprayer for food spraying, wherein the sprayer allows liquids, including slurries, to be sprayed with the same precision and uniformity as deposition (*Spinning Disc Technology* 1–2; Figure). According to the reference, other primary advantages include blockage resistance and easy maintenance and cleaning (*id.* at 2). Given the similarities in the processing systems disclosed in Zimmerman (Zimmerman Fig. 1; col. 20, l. 48–col. 21, l. 17) and *Spinning Disc Technology* (Figure), we share the Examiner’s conclusion that a person having ordinary skill in the art would have been prompted to implement the spinning disc sprayer as disclosed in, e.g., *Spinning Disc Technology* in Zimmerman with a reasonable expectation of achieving accurate and uniform coating, sprayer blockage resistance, and easy sprayer maintenance and cleaning.

For the reasons stated in the Answer (Ans. 10–11), we discern no persuasive merit in the Appellant’s argument that “Zimmerman specifically teaches advantages in the use of nozzles to spray an ingredient suspension on all sides of potato chips” while *Spinning Disc Technology* “teaches covering ‘top only’ or one side of a product” (Appeal Br. 6–7). As an initial matter, claim 1 does not specify any degree of spraying and, therefore, reads on any degree of spraying. Moreover, although Burns teaches that “oil may be applied by spraying oil on all the sides of the food product simultaneously” (Burns ¶ 20), a person having ordinary skill in the art would have understood that the device shown in *Spinning Disc Technology* may

readily be implemented in Zimmerman (*compare* Zimmerman Figure 1 with the Figure shown in *Spinning Disc Technology*).

For these reasons, and those well-stated by the Examiner, we uphold the Examiner's rejection as maintained against claim 1 (and claims 2, 4, and 6–14 falling therewith).

(2) *Claim 3*

Claim 3, which depends from claim 1 through intervening claim 2 (reciting that the “cooked food product comprises cooked corn masa”), specifies that the “cooked food product is a taco shell” (Appeal Br. 13).

The Examiner finds that Zimmerman teaches applying the coating process to products made from corn masa and corn chips, and concludes that this teaching would have suggested applying the process to other corn masa products such as taco shells (Ans. 5–6; *see* Zimmerman col. 4, ll. 13–27; col. 15, ll. 35–49). The Appellant argues that Zimmerman's “coating method is not acceptable for coating taco shells, which must be coated on all sides to obtain a thorough coating” (Appeal Br. 7).

We agree with the Examiner's analysis (Ans. 11–12), which we adopt as our own. As the Examiner explains, “the conclusion that taco shells must be coated on all sides to obtain a thorough coating is [the A]ppellant's own conclusion” and lacks evidentiary support (*id.* at 11). *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a prima facie case of obviousness.”); *In re Lindner*, 457 F.2d 506, 508 (CCPA 1972) (“[M]ere conclusory statements in the specification and affidavits are entitled to little weight when the Patent Office questions the efficacy of those statements.”).

Accordingly, we also sustain the rejection as maintained against claim 3.

(3)–(6) Claims 20–23

Claims 20–23 recite the phrase “consists essentially of” in defining the “at least 35% wt solids” (Appeal Br. 14). The Appellant argues that the phrase “consists essentially of” excludes unrecited materials that would affect the “35% wt solids” (*id.* at 8–11).

Again, we agree with the Examiner’s analysis (Ans. 12–13), which we adopt as our own. In particular, the Appellant fails to direct us to evidentiary support for the proposition that any of the materials disclosed in Zimmerman, such as the vitamins, would materially affect the novel and basic properties of the invention as recited in the claims. *PPG Industries v. Guardian Industries Corp.*, 156 F.3d 1351, 1355 (Fed. Cir. 1998); *In re Herz*, 537 F.2d 549, 551–52 (CCPA 1976); *In re De Lajarte*, 337 F.2d 870, 873 (CCPA 1964).

Therefore, we sustain the rejection as maintained against these claims.

Rejection B. Claim 19, which depends from claim 1, recites “providing the non-aqueous liquid seasoning mixture to the spinning disc sprayer with a progressive cavity pump” (Appeal Br. 14).

The Examiner finds that Zimmerman, Burns, and *Spinning Disc Technology* do not disclose using a progressive cavity pump to deliver a suspension, but finds further that Kelly would have suggested that such a device would be suitable for delivering such a suspension (Ans. 7). The Examiner concludes that “[u]sing a known device for [an] art-recognized function would have been obvious to one skilled in the art” (*id.*).

The Appellant, on the other hand, argues that “Kelly is directed to a process for preparing an alginate or low-methoxy pectate gel and is completely unrelated to seasoning or coating food products” (Appeal Br. 12). According to the Appellant, “[t]here is no indication that the apparatus described for mixing gel would improve or even function properly with the suspension and spinning disc sprayer of the Examiner’s combination” (*id.*).

The Appellant’s argument does not persuade us of any reversible error in the Examiner’s rejection. The mere fact that Kelly’s disclosure uses the pump for a different suspension in a different environment than that disclosed in Zimmerman does not necessarily preclude an obviousness conclusion, because the rejection is based on what the collective teachings would have suggested to a person having ordinary skill in the art. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.”). *See also Ryco, Inc. v. Ag-Bag Corp.*, 857 F.2d 1418, 1425 (Fed. Cir. 1988) (“[I]mproved brake means alone was not patentable” because “[t]he brake perform[ed] the same function as in the references, albeit in a different environment”).

Accordingly, we also uphold the rejection as maintained against claim 19.

IV. CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-4, 6-14, 20-23	103	Zimmerman, Burns, <i>Spinning Disc Technology</i>	1-4, 6-14, 20-23	
19	103	Zimmerman, Burns, <i>Spinning Disc Technology</i> , Kelly	19	
Overall Outcome			1-4, 6-14, 19-23	

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

AFFIRMED