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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHANNES GERARDUS MARIA KLERKEN and
GERARD BARTELS

Appeal 2019-006374
Application 14/068,119
Technology Center 1700

Before JEFFREY T. SMITH, BEVERLY A. FRANKLIN, and
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON APPEAL¹

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner's decision to reject claims 1, 5–11, 13, and 21. Appeal Br. 2. We have jurisdiction under 35 U.S.C. § 6(b).

¹ This Decision includes citations to the following documents: Specification filed October 31, 2013 (“Spec.”); Final Office Action mailed August 24, 2018 (“Final Act.”); Appeal Brief filed February 14, 2019 (“Appeal Br.”); and Examiner's Answer mailed May 31, 2019 (“Ans.”).

² We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as SCelta ESSENZA HOLDING B.V. Appeal Br. 2.

We affirm.

CLAIMED SUBJECT MATTER

Appellant states the invention relates to a method for preserving *Agaricus bisporus* mushrooms. Spec. ¶2. Claim 1, reproduced below, is illustrative of the claimed subject matter (Appeal Br., Claims Appendix 23):

1. A method for preserving *Agaricus bisporus* mushrooms the method comprising the following consecutive steps:
 - a. inserting cleaned *Agaricus bisporus* mushrooms into a plastic laminate bag wherein the laminate bag is retortable and wherein each mushroom comprises a stem and a cap, whereby forming an irregular shaped plastic laminate bag;
 - b. subjecting the bag with the mushrooms to vacuum at a pressure of about 100 mbar or less until there is no air present around the mushrooms and air is removed from the mushrooms;
 - c. sealing the bag while keeping the vacuum;
 - d. releasing the vacuum; and
wherein the bag with the mushrooms is subjected to a sufficient temperature for a sufficient time to cause the mushrooms to be sterilized,
wherein the mushrooms have lost less than 3 wt% before inserted in the bag,
wherein the bag comprises stems and caps of the *Agaricus bisporus* mushrooms.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Keller	US 3,136,468	June 9, 1964
Tessier	“Rising Stars” http://www.starchefs.com/chefs/rising_stars/2009/napa_sonoma/recipe_mushroom_salad_philip_tessier.shtml	May 2009
AAPA	Specification ¶ 5	October 31, 2013
Amazingfood	“Sealing Your Food for Sous Vide” www.amazingfoodmadeeasy.com	January 14, 2009
VacMaster	www.madcowcutlery.com/store/pc/pdf/VP210_Manual.pdf	April 18, 2010
Vivagourmet	“Royal Trumpet/King Trumpet Mushrooms” http://www.vivagourmet.com/product/royal-trumpets-king-trumpet-mushroom/	November 14, 2013
Marxfood	“How Many Sprigs of an Herb are there in a Pound?” marxfood.com/herb-springs-in-a-pound/	August 2, 2011
Hannone	“Weight Equivalents: Garlic” https://hannone.com/Recipe/weightgarlic.html	November 15, 2016
Kitchensavvy	“Cleaning Mushrooms” http://www.kitchensavvy.com/journal/2005/06/cleaning_mushro.html	June 15, 2005
Alineaphile	“Matsutake, Pine Nut, Mastic, Rosemary” http://alineaphile.com/2008/11/matsutake-pine-nut-mastic-rosemary/	November 21, 2008

REJECTIONS

1. The Examiner rejected claims 1, 5–11, 13, and 21 under 35 U.S.C. § 112(a) or 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Final Act. 2–3.

2. The Examiner rejected claims 1, 7–10, 13, and 21 under 35 U.S.C. § 103(a) as unpatentable over Tessier in view of AAPA, Amazingfood, VacMaster, and as evidenced by Vivagourmet, Marxfood, and Hannone. Final Act. 4–9.
3. The Examiner rejected claim 5 under 35 U.S.C. § 103(a) as unpatentable over Tessier, AAPA, Amazingfood, VacMaster, and further in view of Kitchensavvy. Final Act. 9.
4. The Examiner rejected claim 6 under 35 U.S.C. § 103(a) as unpatentable over Tessier, AAPA, Amazingfood, VacMaster, and further in view of Alineaphile. Final Act. 9–10.
5. The Examiner rejected claim 11 under 35 U.S.C. § 103(a) as unpatentable over Tessier, AAPA, Amazingfood, VacMaster, and further in view of Keller. Final Act. 10–11.

OPINION

Rejection 1

The Examiner's Rejection

In rejecting claim 1, the Examiner found there is no support in the original application for the phrase “whereby forming an irregular shaped plastic laminate bag.” Final Act. 3. As a result, the Examiner found this limitation to be new matter. *Id.* In the Answer, the Examiner further explained that because there is a difference between Figure 1 of the claimed priority application NL2006738 and Figure 1 of the US application and the limitation is not disclosed in the written description, the limitation is considered new matter. Ans. 16–17.

Appellant's Contentions

Appellant argues Figures 1C, 1D, and 1E of the Specification depict an irregular shaped plastic laminate bag, which provides support for the claim limitation. Appeal Br. 22.

Issue

The dispositive issue with respect to this rejection is:

Did the Examiner err in finding the phrase “whereby forming an irregular shaped plastic laminate bag” as recited in claim 1 lacks written description support in the Specification?

Discussion

We are not persuaded by Appellant’s arguments. Claim 1 recites inserting cleaned *Agaricus bisporus* mushrooms into a plastic laminate bag “whereby forming an irregular shaped plastic laminated bag.” Although the Specification describes plastic laminate bags (Spec. ¶¶ 37–43), the Specification does not describe situations where inserting *Agaricus bisporus* mushrooms changes the shape of the bag. In addition, Figures 1C, 1D, and 1E, relied on by Appellant for support already depicts the presence of the mushrooms in the bags, and is therefore insufficient to provide written description support for the limitation recited in claim 1.

Accordingly, we affirm the Examiner’s rejection of claim 1, as well as the dependent claims, which are rejected as a result of their dependency from claim 1. *See* Final Act. 3.

Rejection 2

Appellant does not present separate arguments with respect to the claims subject to this rejection. *See* Appeal Br. 6–22. We select claim 1 as representative for disposition of this appeal, with the patentability of the other claims standing or falling with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner's Rejection

In rejecting claim 1 as obvious over Tessier, AAPA, Amazingfood, and VacMaster, the Examiner found Tessier discloses cooking whole trumpet mushrooms sous vide by sealing the mushrooms in a bag and cooking them at 212 °F for 30 minutes. Final Act. 4. The Examiner found Tessier fails to disclose *Agaricus bisporus* mushrooms, but determined that it would have been obvious to have modified Tessier to have prepared *Agaricus bisporus* mushrooms, particularly in view of the AAPA's disclosure that *Agaricus bisporus* mushrooms are the most commonly used mushroom in a number of countries for human consumption. *Id.* at 4–5. The Examiner found that the cooking conditions in Tessier meet the sterilization recited in claim 1. *Id.* at 7. The Examiner found Tessier does not disclose a laminate bag as recited in claim 1, but found that Amazingfood discloses laminate bags for use with chambered vacuum food sealers that are conventionally used in sous vide cooking. *Id.* at 5. As a result, the Examiner determined it would have been obvious to have used laminate bags for mushroom sous vide cooking as disclosed in Tessier. *Id.* In addition, the Examiner found that because the Specification defines “retortable” as the ability to withstand sterilizing conditions, and the sous vide cooking method meets the sterilization conditions, the boilable laminate

bags conventionally used in sous vide cooking meet the claimed “retortable” limitation. Ans. 14.

Appellant’s contentions

Appellant argues the Examiner has not properly construed the teachings of Tessier, Amazingfood, and VacMaster, because none of the cited references relates to a method of preserving mushrooms. Appeal Br. 6–10, 19–21. Appellant contends Tessier does not disclose a method of preserving mushrooms as recited in claim 1, but rather discloses a method of sous vide cooking, which is commonly known not to cause sterilization of mushrooms. *Id.* at 7, 15. In particular, Appellant contends the Examiner has not provided sufficient evidence that the conditions disclosed in Tessier would necessarily sterilize the mushrooms. *Id.* at 16–18. Appellant argues the Examiner has simply assumed the VacMaster bags are “retortable” as recited in claim 1. *Id.* at 12–14, 18–19.

Issue

Did Appellant sufficiently establish that the Examiner reversibly erred in determining the method for preserving *Agaricus bisporus* mushrooms recited in claim 1 would have been obvious over the prior art of record?

Discussion

We are not persuaded by Appellant’s arguments. In particular, we are not persuaded by Appellant’s argument that the Examiner has not provided sufficient evidence that Tessier’s method would result in sterilization of the mushrooms. As discussed above, the Examiner pointed expressly to the

disclosure in Tessier that mushrooms are sealed in a vacuum bag and heated at 212 °F (100 °C) for 30 minutes. Tessier 1–2. As the Examiner explained, the conditions in Tessier lie inside the temperature and time ranges for sterilization disclosed in the Specification. Ans. 14, citing Spec. ¶ 52 (“For sterilization, it is preferred to apply a temperature between 100 and 150 °C, preferably between 120 and 140 °C, for about 30 to 5 min.”).

Appellant contends that the conditions disclosed in Tessier correspond to pasteurization conditions, which are not the same as sterilization conditions and that the Specification discloses overlapping conditions between sterilization and pasteurization only to accommodate sterilization procedures including one or more steps where the first step is performed at lower temperature. Appeal Br. 17–18. We are not persuaded by this argument because the Specification does not describe particular conditions that would indicate 100 °C would fall into some lower temperature range that is insufficient to achieve sterilization. Indeed, the two step process described in the Specification highlighted by Appellant expressly discloses a first temperature (80 °C) that lies *outside* the temperature range of 100 to 150 °C disclosed as sterilization temperatures. *Id.* at 17; Spec. ¶ 52.

As to Appellant’s argument that the Examiner does not sufficiently address the claimed “retortable” laminate bag (Appeal Br. 18–19), we are not persuaded by this argument. As the Examiner explained in the Answer, the VacMaster laminate bags are sealed and may be boiled, in other words, may be subject to temperatures such as 100 °C, as in the sous vide cooking method disclosed in Tessier, which are sterilization conditions as discussed above according to the Specification. Ans. 14, citing VacMaster 2–4. We agree with the Examiner that the Specification only defines “retortable” as

being “ab[le] to withstand sterilizing conditions.” *Id.*; Spec. ¶ 43. To the extent Appellant argues the presence of special adhesives between plastic layers of a retortable laminate bag (Appeal Br. 19), we observe that the Specification states only that such laminates “generally” have special adhesives (Spec. ¶ 43), and as such, the disclosure in the Specification is insufficient to distinguish the VacMaster laminate bags.

Thus, we are not persuaded by Appellant’s arguments that the Examiner has failed to properly construe the teachings of Tessier, Amazingfood, and VacMaster, rather, the preponderance of the evidence of record supports the Examiner’s position that the method recited in claim 1 would have been obvious over the prior art of record.³

Accordingly, we affirm the Examiner’s rejection of claim 1, and claims 7–10, 13, and 21 dependent therefrom.

Rejections 3–5

For claims 5, 6, and 11, the claims subject to Rejections 3–5, Appellant does not present separate argument regarding these claims. Accordingly, we affirm Rejections 3–5 for similar reasons discussed above for Rejection 2.

³ Appellant has cited a number of additional pieces of evidence in the Appeal Brief not previously of record. *See* Appeal Br. 9 (n.3), 11 (n.4), 12 (nn.5, 6), 15–16 (nn.8, 9), 17 (n.10). Such new evidence is not proper in an Appeal Brief. 37 C.F.R. § 41.37(c)(2). Accordingly, Appellant’s new evidence has not been considered in deciding this appeal.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 5–11, 13, 21	112	Written Description	1, 5–11, 13, 21	
1, 7–10, 13, 21	103(a)	Tessier, AAPA, Amazingfood, VacMaster, Vivagourmet, Marxfood, Hannone	1, 7–10, 13, 21	
5	103(a)	Tessier, AAPA, Amazingfood, VacMaster, Vivagourmet, Marxfood, Hannone, Kitchensavvy	5	
6	103(a)	Tessier, AAPA, Amazingfood, VacMaster, Vivagourmet, Marxfood, Hannone, Alineaphile	6	
11	103(a)	Tessier, AAPA, Amazingfood, VacMaster, Vivagourmet, Marxfood, Hannone, Keller	11	
Overall Outcome			1, 5–11, 13, 21	

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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