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K&L Gates LLP-Nestec S.A. P.O. Box 1135 Chicago, IL 60690			ZILBERING, ASSAF	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte FRANK ARTHUR COLE,
JAMES CHRISTIAN STUDDTMANN, and JEREMY HARDWICK

Appeal 2019-006910
Application 14/367,656
Technology Center 1700

Before MICHAEL P. COLAIANNI, N. WHITNEY WILSON, and
MICHAEL G. McMANUS, *Administrative Patent Judges*.

WILSON, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's January 14, 2019 decision to reject claims 8–18 (“Non-Final Act.”). We have jurisdiction under 35 U.S.C. § 6(b).

We affirm in part.

¹ 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 Nestec S.A. (Appeal Br. 2).

CLAIMED SUBJECT MATTER

Appellant's disclosure is directed to, *inter alia*, methods for making a dough-based food product, including mixing a dough having malted barley flour in a specific amount, fermenting the dough, pressing the dough with a die having unique characteristics, and baking the dough to form a baked dough (Abstract). Claim 8, reproduced below from the Claims Appendix, is illustrative of the claimed subject matter:

8. A method of making a dough-based food product, the method comprising:
 - mixing a dough having malted barley flour in an amount of 1.5% to 2.5% by flour weight;
 - fermenting the dough;
 - pressing the dough with a die having a characteristic selected from the group consisting of a regular shape, an irregular shape, a channel formed along a bottom perimeter of the die, and combinations thereof; and
 - baking the dough to form the dough-based food product.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Betts, Jr. et al.	US 5,074,778	December 24, 1991
Degli	EP 0 691 078 A2	January 10, 1996
Malted Barley Flour	www.cooksinfo.com	July 13, 2007
Cara Amico	www.burgersdogspizza.com/tag/portland-pizza-delivery/	December 14, 2010

REJECTIONS

1. Claims 8–14 are rejected under 35 U.S.C. § 103 as unpatentable over Degli in view of Betts and Malted Barley Flour.

2. Claims 15–18 are rejected under 35 U.S.C. § 103 as unpatentable over Degli in view of Betts and Malted Barley Flour, and further in view of Cara Amico.

DISCUSSION

The Examiner finds that Degli teaches each of the limitations of claim 8, except that it does not teach (1) the use of malted barley flour in an amount from 1.4–25%, or (2) the step of pressing the dough with a die (Non-Final Act. 3, citing Degli Abstract, 1:56–3:55). As for difference (2), the Examiner finds that Betts teaches the use of the die, and that doing so gives a pizza the look of a hand formed pizza (Non-Final Act. 4). Therefore according to the Examiner, it would have been obvious to combine Betts’s die with Degli’s process to make machine formed pizzas that look like hand formed pizzas. With regards to difference (1), the Examiner finds that Malted Barley Flour teaches that malted barley flour can be used in baked goods, such as pizza dough, and that up to 25% of the wheat flour used can be substituted with malted barley flour, and that the malted barley flour provides the dough with a softer crumb because it has less gluten (*id.*, citing Malted Barley Flour 1). The Examiner finds that it would have been obvious to use up to 25% malted barley flour in Degli’s process in order to achieve a softer dough, and that because of the overlapping ranges, the claimed amount of malted barley flour (1.5–2.5%) would also have been obvious (Non-Final Act. 4).

Appellant argues that they have established the criticality of using 1.5–2.5% malted barley flour, and that this amount would not have been obvious in view of the broad disclosure of Malted Barley Flour. Appellant bases these arguments on the two Rule 132 Declarations of Frank Cole,

dated November 27, 2017 (“Decl. I”) and August 9, 2018 (Decl. II”), each of which is of record.

It is well settled that Appellant has the burden of showing unexpected results. *In re Freeman*, 474 F.2d 1318, 1324 (CCPA 1973); *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). Such burden requires Appellant to proffer factual evidence that actually shows unexpected results relative to the closest prior art, *see In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991), and that is reasonably commensurate in scope with the 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); *In re Hyson*, 453 F.2d 764, 786 (CCPA 1972). The extent of the showing relied upon by Appellant must reasonably support the entire scope of the claims at issue. *See In re Harris*, 409 F.3d 1339, 1344 (Fed. Cir. 2005).

Following our review of the data and evidence set forth in Declaration I and Declaration II, we agree with the Examiner that Appellant has not met its burden of adequately demonstrating the criticality of the claimed range for independent claims 8 and 15. In particular, we agree with the Examiner that although the data is sufficient to show the criticality of 1.5% malted barley flour as compared with 0.5% and 3.0%, it does not demonstrate that either 2.0% or 2.5% (each of which falls within the claimed range set forth in claim 8) would also have the unexpectedly good results required in view of the prior art for reversal of the rejection. Specifically, since 1.5% malted barley flour provides the unexpected results, but 3.0% provides unsatisfactory results, there is no objective evidence which demonstrates that 2.5% malted barley flour would provide results more similar to 1.5% malted barley flour than to the unsatisfactory results obtained using 3.0% malted barley flour.

Accordingly, the evidence set forth in the Declarations is not sufficient for reversal of the rejections of claims 8 and 15.

However, with respect to claims 9 and 18 (which recite malted barley flour amounts of 1.5%–2.0%), the evidence presented in Declaration II² is sufficient to show the criticality of the ranges recited therein.

Appellant also argues that a person of skill in the art would not have found the non-peer reviewed information in Malted Barley Flour as reliable with respect to its teaching that up to 25% of wheat flour can be replaced with malted barley flour (Appeal Br. 9–10). However, the reference (Malted Barley Flour) provides the teachings attributed to it by the Examiner, and Appellant has not provided objective evidence to indicate that this teaching would not have been believed by one of skill in the art. That another reference teaches the use of a different amount of malted barley flour does not mean that the teachings of the cited art would not have been believed or would have been thought to be inoperable.

Appellant does not offer additional arguments for the patentability of claims 10, 11, 16, and 17, but merely relies on the arguments made in connection with claims 8 and 15, and makes no specific mention of claims 12–14. Accordingly, we also affirm the rejections of those claims.

² Paragraph 9 of Declaration II states that the use of malt barley flour in an amount of from “1.5-2.0%” created a dough that was capable of being produced with the mixing and forming equipment, and had other good properties, which was distinguished from the composition containing 3.0% malted barley flour.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
8–14	103	Degli, Betts, Malted Barley Flour	8, 10–14	9
15–18	103	Degli, Betts, Malted Barley Flour, Cara Amico	15–17	18
Overall Outcome			8, 10–17	9, 18

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) (2018).

AFFIRMED IN PART