

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANIL BHAGWAN KHARE

Appeal 2006-2130
Application 10/236,111
Technology Center 1700

Decided: September 28, 2006

Before GARRIS, KRATZ, and GAUDETTE, *Administrative Patent Judges*.
KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the Examiner's final rejection of claims 1-20.
We have jurisdiction pursuant to 35 U.S.C. § 134.

Appellant's invention is directed to a sterol ester composition, a confectionary product containing such a composition, and a method for producing such a composition. Claim 1 is illustrative and reproduced below:

1. A composition comprising a steryl ester, wherein the sterol moiety of said steryl ester is a phytosterol and the ester moiety of said steryl ester comprises a blend of fatty acids, wherein said blend of fatty acids comprises at least 80% oleic acid.

The Examiner relies on the following prior art references as evidence in rejecting the appealed claims:

Schul US 2002/0016317 Feb. 7, 2002

Daniel Swern, *Bailey's Industrial Oil and Fat Products*, Vol. 1, 4th edition, John Wiley & Sons, New York, p. 370 (1979)

Dimitrios Boskus, *Olive Oil Chemistry and Technology*, AOCS, Press, Champaign, Illinois, p. 52-53 (1996)

Claims 1-20 stand rejected under 35 U.S.C. § 103 (a) as being unpatentable over Schul as further evidenced by Baileys and Olive Oil Chemistry.¹

OPINION

We have reviewed each of Appellant's arguments for patentability. However, we are in agreement with the Examiner that the claimed subject

¹ The Examiner omits an introductory sentence listing the rejected claims (by claim number) and identifying the references relied upon in the statement of the rejection in the Answer. However, that error is harmless in that Appellant recognizes the evidence relied upon by the examiner in the Brief and Appellant identifies claims 1-20 as the claims subject to the sole ground of rejection before us on appeal. Moreover, the Examiner furnishes a listing of the relied upon evidence at page 3 of the Answer that corresponds with the evidence referred to by Appellants and is the same evidence employed in the final Office action rejection and the body of the rejection in the Answer.

matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection for essentially the reasons expressed in the Answer. We add the following for emphasis.

Appellant does not argue the claims separately. Thus, we select claim 1 as the representative claim on which we shall decide this appeal.

Schul discloses or suggests compositions comprising a sterol ester wherein the sterol moiety of the sterol ester is a phytosterol (plant sterol) and the ester moiety is a blend of fatty acids comprising oleic acids in amounts that overlap the representative claim 1 range of at least 80 percent oleic acid. See, for example, paragraphs 0016, 0045, 0046 and 0048 of Schul. In this regard, we note that the Examiner cites Baileys and Olive Oil Chemistry to evidence that olive oil is known to contain up to 82 percent oleic acid. Moreover, we note that Schul (para. 0045) teaches the use of high oleic sunflower oil as a suitable fatty acid ester.² Consequently, we agree with the Examiner that the evidence relied upon makes out a *prima facie* case of obvious for the subject matter of representative claim 1. *See In re Peterson*, 315 F.3d 1325, 1329-30, 65 USPQ2d 1379, 1382 (Fed. Cir. 2003) (“A *prima facie* case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art...”); *In re Geisler*, 116 F.3d 1465, 1469, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997); and *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990).

² Appellant acknowledges (Specification, p. 4, ll. 7-18) that known high oleic sunflower oils contain oleic acid contents within the claimed range of at least 80 percent oleic acid.

Appellant argues that the most preferred range of monounsaturated fatty acids (MUFAs) disclosed by Schul has an upper limit of 75 percent MUFAs, which would represent a value of oleic acid content outside the claimed range. Such argument is unpersuasive in that Schul's teachings are not limited to the most preferred range described therein. Concerning this matter, it is well settled that a reference must be considered in its entirety, and it is well-established that the disclosure of a reference is not limited to preferred embodiments or specific working examples contained therein. *See In re Fracalossi*, 681 F.2d 792, 794 n.1, 215 USPQ 569, 570 n.1 (CCPA 1982); *In re Lamberti*, 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976). In this regard, we are bound to consider the disclosure of each reference for what it fairly teaches one of ordinary skill in the art, including not only the specific teachings, but also the inferences which one of ordinary skill in the art would reasonably have been expected to draw therefrom. *See In re Boe*, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966); and *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

In the case before us, there is ample direction in the applied prior art for reasons set forth above and in the Answer that would have suggested the use of an ester moiety with an oleic acid content within the claimed range in formulating the sterol ester composition of Schul. In this regard, the mere fact that Schul may suggest sterol ester compositions having an oleic acid content outside of the here claimed oleic acid content range does not detract from Schul's teachings using sterol ester compositions that include oleic acid moiety contents within the here claimed range. Indeed, Schul (para. 0017) notes expected health benefits are associated with high levels of MUFAs. While solubility of the sterol compositions is a concern noted by

Schul, the patent publication does not teach that providing oleic acid contents above 80 percent results in an unworkable solubility, as Appellant seems to suggest (Br. 3-4). Rather, Schul (para. 0010) teaches that esterification increases plant sterol solubility. Moreover, Schul (para. 0018) discloses/suggests that the esterified sterol using MUFAs as the ester moiety, such as those inclusive of the here claimed oleic acid content, has the additional advantageous property of remaining clear and uncloudy when mixed with other clear edible oils.

As a final point, we note that Appellant has not argued, much less furnished persuasive evidence to establish, that the representative claim 1 composition is attended by unexpected results.

On this record, we shall sustain the Examiner's obviousness rejection.

CONCLUSION

The decision of the Examiner to reject claims 1-20 under 35 U.S.C. § 103 (a) as being unpatentable over Schul as further evidenced by Baileys and Olive Oil Chemistry is affirmed.

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

AFFIRMED

sld

JEFFREY J. SKELTON
P.O. BOX 5624
MINNEAPOLIS, MN 55440