

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 MICHAEL J. SAYLOCK and DAN DIXON

Appeal 2006-2327
Application 10/239,287
Technology Center 1700

Decided: December 7, 2006

Before GARRIS, WARREN, and JEFFREY T. SMITH, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-9, 11-17, 19-25, and 27-29.

The subject matter on appeal relates to pet food comprising a protein-rich body having a seared or browned appearance and having a coating which includes an acid and a sugar. This appealed subject matter is adequately represented by independent claims 1 and 21 which read as follows:

1. A pet food comprising an edible, formulated, protein-rich body having a seared appearance, a moisture content of approximately 20% to about 60% by weight, wherein the body has a coating that includes an acid and a sugar, and a structure so constructed and arranged to provide a firmness of texture so as to be resilient under initial pressure of biting by a pet animal.

21. A pet food product comprising a sealed container, a plurality of edible, formulated, protein rich bodies within the container, said bodies having a browned appearance, a moisture content of approximately 20% to about 60% by weight, a coating that includes an acid and a sugar and a structure providing a sufficient firmness of texture so as to be resilient under an initial pressure of biting by a pet animal.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Fritsch	CA 796683	Oct. 15, 1968
Buck	US 3,653,908	Apr. 4, 1972
Mohrman	US 3,679,429	Jul. 25, 1972
Palmer	US 3,873,736	Mar. 25, 1975
Kealy	US 3,930,031	Dec. 30, 1975
Froebel	EP 0 258 037 A2	Mar. 2, 1988
Karwowski	US 5,731,029 A	Mar. 24, 1998
Poppel	US 5,792,504 A	Aug. 11, 1998
Brescia	US 5,869,121 A	Feb. 9, 1999

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Under 35 U.S.C. § 103(a):
claims 1-5, 8, 11, 12, 15, 16, 20, 21, and 27 are rejected as being unpatentable over Brescia in view of Mohrman, Kealy, and Fritsch;
claims 1-6, 8, 9, 11-13, 15, 16, 19, 21, 22, 25, and 27 are rejected over Frobel in view of Mohrman, Kealy, and Fritsch, and claims 14, 17, 28 and 29 are correspondingly rejected over these references and further in view of Buck;
claims 1-9, 11-13, 15, 16, 21, 24, and 27 are rejected over Palmer in view of Mohrman, Kealy, and Fritsch;
claims 1-9, 11-17, 19-23, 25 and 27-29 are rejected over Poppel in view of Mohrman, Kealy, and Fritsch; and
claims 1-9, 11-13, 15-17, 19-22, 24, 25, and 27 are rejected over Karwowski in view of Mohrman, Kealy, and Fritsch, and claims 14, 17, 28, and 29 are correspondingly rejected over these references and further in view of Buck.

We refer to the Brief and Reply Brief and to the Answer for a complete exposition of the opposing viewpoints expressed by the Appellants and by the Examiner concerning the above noted rejections.

Within the respective rejections before us, no individual claim has been separately argued by the Appellants in the manner required by 37 C.F.R. § 41.37(c)(1)(vii)(2005). Accordingly, the claims in each rejection

will stand or fall together as a group. We will focus on independent claims 1 and 21 as representative of the rejected claims.

OPINION

For the reasons set forth in the Answer and below, each of these rejections will be sustained.

It is the Examiner's basic position that it would have been obvious for one with ordinary skill in the art to provide the coating of the pet food taught by each of the primary references with both a sugar and an acid in order to enhance palatability in view of the teachings by Mohrman and Kealy concerning acid and the teaching by Fritsch concerning sugar as flavor or palatability enhancing ingredients. It is also the Examiner's position that the pet food resulting from this provision would possess a browned or seared appearance, particularly since the primary references cook their pet foods with the same techniques (e.g., a frying technique; see ll. 56-65 in col. 3 of Brescia) as used by Appellants to achieve a browned or seared appearance (e.g., see the seventh paragraph on page 2 of the subject Specification).

The Appellants argue that the applied references contain no teaching or suggestion which would have motivated an artisan to provide the pet food coatings of the primary references with both a sugar and an acid. In this regard, it is the Appellants' view that the prior art teachings of sugar and acid individually as palatability enhancers would not have suggested their combination as palatability enhancers. We cannot agree.

It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition which is to be used for the very same purpose. *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980).

Here, the secondary references to Mohrman, Kealy, and Fritsch teach coating compositions which contain acid as a palatability enhancer and coating compositions which contain sugar as a palatability enhancer. In light of these teachings, it would have been obvious for an artisan to provide a third coating composition which contains both acid and sugar in order to obtain their combined effect as palatability enhancers.¹

The Appellants further argue that the applied references contain no teaching or suggestion of pet food having a browned or seared appearance as required by the appealed claims.

However, as indicated above, the primary references such as Brescia teach cooking the pet foods disclosed therein via the same techniques used by Appellants to create a browned or seared appearance. Thus, the primary reference pet foods, when modified to include a coating of acid in

¹The Appellants seem to believe that an artisan would have been concerned that the combination of acid and sugar would interact in such a manner as to militate against palatability. However, there is no basis for such a belief. Indeed, the prior art teaches use of acid and sugar together in pet food albeit not in the form of a coating (e.g., see Karwowski at ll. 21-34 of col. 8 and at ll. 43-52 of col. 9)

combination with sugar as proposed by the Examiner, would be constitutionally identical to the Appellants' pet food and would have been subjected to the same cooking techniques as the Appellants' pet food. Under these circumstances, it is reasonable to consider that the pet food suggested by the applied references would necessarily have the same appearance as the Appellants' pet food. Moreover, a number of the primary reference pet foods are expressly described as having a brown appearance. For example, see Froebel at lines 33-35 on page 4, Poppel at lines 23-25 of col. 7, and Karwowski at ll. 28-30 of col. 12. Further in this regard, we are aware of no distinction between pet food having a browned appearance such as the pet food of Froebel, Poppel, and Karwowski and pet food having a seared appearance. Significantly, no such distinction is argued by the Appellants in their Briefs. Indeed, the Appellants' Specification seems to use the terms browning and searing synonymously (e.g., see the penultimate paragraph on Specification page 1).

In light of the foregoing, it is our ultimate determination that the reference evidence adduced by the Examiner establishes a prima facie case of obviousness which the Appellants have failed to successfully rebut with argument or evidence of nonobviousness. We hereby sustain, therefore, each of the Section 103 rejections before us on this appeal. *See In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

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The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2004).

AFFIRMED

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