

The opinion in support of the decision being entered today is  
*not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* HARRY M. CLARK,  
WILLIAM D. SCHOENHERR,  
CRAIG R. COWLEY  
And KIM G. FRIESEN

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Appeal 2007-1180  
Application 10/405,742  
Technology Center 1700

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Decided: September 6, 2007

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Before BRADLEY R. GARRIS, CHARLES F. WARREN, and  
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

#### DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the final rejection of claims 1-7. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants claim a composition comprising an extruded pet food discrete particle having dimensional stability with less than 15 wt. % carbohydrate. Appellants also claim a method of preparing the aforementioned pet food which comprises extruding the pet food at increased shear.

Representative claims 1 and 6 read as follows:

1. A composition comprising an extruded pet food discrete particle having dimensional stability, the said pet food having zero to less than about 15 wt.% carbohydrate.

6. A method of preparing the pet food of Claim 1 comprising extruding the pet food at increased shear.

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

Kearns	US 4,981,711	Jan. 1, 1991
Wenger	US 5,783,240	Jul. 21, 1998
Hodgkins	US 6,203,825 B1	Mar. 20, 2001
Jewell	US 6,410,063 B1	Jun. 25, 2002

All of the appealed claims are rejected under 35 USC § 103(a) as being unpatentable over Hodgkins and Jewell in view of Wenger and Kearns.

It is the Examiner's basic position that it would have been obvious for one with ordinary skill in this art to use the fish food-making, high-shear extrusion processes of Wenger and Kearns for preparing the low-carbohydrate, high-protein, high-fat pet food of Hodgkins and Jewell (Answer 5). Appellants argue that Hodgkins and Jewell are directed to

certain pet food diets rather than to the compositions of claims 1-5 (Br. 6) and that Wenger and Kearns disclose extrusion processes for fish food but not the pet food compositions of the appealed claims (Br. 6-7). The Appellants also argue that the applied references contain no teaching or suggestion for combining them in such a manner as to yield the claimed subject matter based upon a reasonable expectation of success (Br. 7-8).

For the reasons which follow, we will sustain the above-noted rejection.

As an initial matter, we do not agree with all of the claim distinctions urged by Appellants. For example, Hodgkins' pet food composition (e.g., Example 3 at col. 15-16) includes the ingredients and amounts required by composition claims 1-5. Moreover, Appellants have proffered no evidence to show that the dimensional stability of Hodgkins' composition particles differs from the dimensional stability required by claims 1-5. *See In re Best*, 562 F.2d 1252, 1255-56, 195 USPQ 430, 433-34 (CPA 1977).

Similarly, the fish food pellets of Wenger contain ingredients and amounts falling within the scope of claims 1-5 (col. 1, ll. 39-65; claim 1 at cols. 15-16). Moreover, the Appellants again have provided the record with no evidence that the dimensional stability of Wenger's pellets differs from the dimensional stability required by the appealed claims. *Best*, 562 F.2d at 1255-56, 195 USPQ at 433-34. In addition, Wenger's pellets are prepared by extruding at increased shear as required by method claims 6 and 7 (col. 2, ll. 17-18; col. 3, ll. 35-44).

We also do not agree with Appellants that an artisan would not have been motivated to combine the applied reference teachings based upon a

reasonable expectation of success to thereby achieve the subject matter defined by the appealed claims. For example, Hodgkins expressly teaches that her low carbohydrate, high-protein and fat pet food can be made using methods known to those skilled in the art including extrusion (col. 11, ll. 52-56). Further, Wenger teaches using an extrusion process for making a low carbohydrate, high-protein and fat fish food. Under these circumstances, it would have been obvious for an artisan to employ the extrusion process of Wenger in order to make the pet food of Hodgkins in light of the compositional similarities of the Wenger and Hodgkins food compositions and in light Hodgkins' express teaching of using an extrusion process for making her pet food. While we recognize that Wenger's composition is used as an aquatic feed for fish, this fact does not forestall an obviousness conclusion. As the Supreme Court has recently explained, "[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one" *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1740, 82 USPQ2d 1385, 1395 (Fed. Cir. 2007).

Finally, Appellants argue that "Wegner [sic, Wenger] teaches away from the present invention by encouraging the use of liquid fat, fat that would tend not to be retained by the food particle" (Br. 8). This argument, which appears to be applicable only to dependent claim 5, is unpersuasive. This is because the record before us contains no evidence that liquid fat militates against fat retention. Indeed, the Appellants explicitly teach providing their pet food composition with fat from any source including liquid fat (Specification para. bridging 2-3).

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For the above stated reasons, it is our determination that the reference evidence adduced by the Examiner establishes a prima facie case of unpatentability for each of the appealed claims which the Appellants have failed to successfully rebut with argument or evidence of patentability. *See In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). We hereby sustain, therefore, the § 103 rejection of all appealed claims as being unpatentable over Hodgkins and Jewell in view of Wenger and Kearns.

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)(iv)(effective Sept. 13, 2004).

AFFIRMED

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