

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CATHRYN FRITZ-JUNG,
SANDEEP BHATNAGAR,
DONALD ROLAND SPECK,
and KARL L. KETTINGER,
Appellants

Appeal 2008-2184
Application 10/166,888¹
Technology Center 1700

Decided: April 29, 2008

Before CHUNG K. PAK, CAROL A. SPIEGEL, and MARK NAGUMO,
Administrative Patent Judges.

SPIEGEL, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ Application 10/166,888 ("the 888 application"), titled "Pressure Formed Pet Food and Method," was filed 11 June 2002. The real party-in-interest is said to be NESTEC, LTD. (APPELLANTS' APPEAL BRIEF filed 28 June 2007 ("App. Br.") 2).

I. Statement of the Case

Appellants appeal under 35 U.S.C. § 134 from the final rejection of claims 1, 3, and 5-30, all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

The subject matter on appeal relates to tableted high protein and fat content pet foods and methods of manufacture thereof. According to Appellants' specification, dry pet foods having certain proportions of carbohydrates and proteins are manufactured using conventional extrusion processes (Spec. ¶3). Special needs diets and starter diets for young pets have increased proportions of protein and fat (Spec. ¶4). The lower carbohydrate content in high protein and fat pet foods is said to produce a friable extrudate subject to excessive breakage during subsequent processing (*id.*). However, according to Appellants' specification (Spec. ¶23),

By extruding a high protein and fat formulation and grinding the friable extrudate into a cake mix, an acceptable pet food product may be formed from the cake mix using known pressure forming techniques. This general methodology is utilized to produce pet foods having up to 70 weight % protein content, up to 27 weight % fat content, and up to 100 weight % [sic] carbohydrate (e.g., starch) content.

One embodiment of the methodology comprises blending food formulation ingredients into a meal with a mixer; moistening the meal; extruding the moistened meal; drying the extrudate, in the form of powder, crumbs, shreds, and flakes; grinding the dried extrudate with a mill; pressure forming the milled extrudate into solid tablets with a tabletting press; and coating the tablets with fat and palatability enhancers (Spec. ¶24). For

example, the ground/milled extrudate is pressed into solid tablets, weighing about one gram each, at rate of 250 to 500 tablets per minute and at a pressure of 6000 psi (Spec. ¶28), and sprayed with 8 wt.% tallow in a batch size of four pounds (Spec. ¶ 29).

Claims 1 and 18 are illustrative of the subject matter on appeal and read (App. Br., Claims Appendix, i and iii):

1. A method for manufacturing pet food comprising:
extruding a base meal formulation comprising a carbohydrate content of less than about 20 weight%, a protein content of greater than about 50 weight%, and a fat content of less than about 27 weight%;
grinding the extruded meal; and
pressure forming the ground meal into solid form in a tabletting press.
18. An extruded and tableted pet food product comprising:
a protein content of at least about 50 weight%;
an overall fat content of at least about 16 weight %; and
a carbohydrate content of less than about 20 weight%.

The Examiner has rejected claims 1, 3, and 5-30 under 35 U.S.C. § 103(a) as unpatentable over the combined teachings of Fritz-Jung,² Balaz,³ Miller,⁴ Colosimo,⁵ van Lengerich,⁶ Jewell,⁷ and Hodgkins⁸ (Ans.⁹ 3).

² U.S. Patent 6,270,820 B1, titled "Process for Dry Stable Intermediate Pet Food Composition," issued 7 August 2001 to Fritz-Jung et al. ("Fritz-Jung").

³ U.S. Patent 4,055,681, titled "Method of Making a Dry-Type Pet Food," issued 25 October 1977, to Balaz et al. ("Balaz").

⁴ U.S. Patent 3,899,607, titled "Simulated Bone," issued 12 August 1975 to Miller et al. ("Miller").

⁵ U.S. Patent 5,198,237, titled "Extrusion Die Arrangement for Attachment to a Food Grinder," issued 30 March 1993 to Colosimo et al. ("Colosimo").

⁶ U.S. Patent 6,190,591 B1, titled "Embedding and Encapsulation of Controlled Release Particles," issued 20 February 2001 to Bernhard H. van Lengerich ("van Lengerich").

II. Legal Principles

A claimed invention is not patentable if the subject matter of the claimed invention would have been obvious to a person having ordinary skill in the art. 35 U.S.C. § 103(a); *KSR Int'l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727 (2007); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966). The resolution of the ultimate legal conclusion of obviousness is dependent upon the facts of each particular case. *In re Durden*, 763 F.2d 1406 (Fed. Cir. 1985). Facts relevant to a determination of obviousness include (1) the scope and content of the prior art, (2) any differences between the claimed invention and the prior art, (3) the level of ordinary skill in the art, and (4) relevant objective evidence of obviousness or non-obviousness. *KSR*, 127 S.Ct. at 1734; *Graham*, 383 U.S. at 17-18.

Obviousness requires a suggestion of all the elements in a claim (*CFMT, Inc. v. Yieldup Int'l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003)) and "a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR*, 127 S.Ct. at 1741. "On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness." *In re Kahn*, 441 F.3d 977, 985-86

⁷ U.S. Patent 6,410,063 B1, titled "Composition and Method," issued 25 June 2002 to Jewell et al. ("Jewell"), based on application 09/952,697, filed 13 June 2000.

⁸ U.S. Patent 6,203,825 B1, titled "Method and Composition to Protect an Obligate Carnivore from a Disease of Abnormal Carbohydrate Metabolism," issued 20 March 2001 to Elizabeth Hodgkins ("Hodgkins").

⁹ Examiner's Answer mailed 20 August 2007 ("Ans.").

(Fed. Cir. 2006) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

III. Discussion

The Examiner found that Fritz-Jung teaches extruding a base mixture of pet food ingredients into flakes; grinding the flakes, albeit at a different location; re-extruding the ground flakes; and, cutting the "re-extrudate" into pieces or kibbles (Ans. 4 and 7). The Examiner found that Fritz-Jung differed from the claimed subject matter in failing to teach the type of ingredients and their wt.% in the base mixture, to add a binder, and to pressure form the ground meal/flakes with a tabletting press. The Examiner concluded that it would have been obvious to:

- (i) use the formulation of Balaz, which provides for a moisture content of less than 15 wt.% and a carbohydrate content of less than 20 wt.% (preferably, little or no carbohydrate), as the base mixture of Fritz-Jung to obtain the benefits of a low-carbohydrate pet food disclosed by Jewell and Hodgkins;
- (ii) incorporate the binder used by Balaz or Miller into the base mixture of Fritz-Jung; and,
- (iii) incorporate the grinder arrangement and method steps of Colosimo and Miller to form a pet food with a desired shape,
- (iv) substituting van Lengerich's die arrangement when a pellet is required (Ans. 4-6).

Appellants argue that the Examiner failed to establish a *prima facie* case of obviousness because the prior art provides no reason to arrive at the claimed invention. (App. Br. 11.) Appellants argue further that some of the

references teach away from the combinations asserted by the Examiner.

(*Id.*)

Here, we find that the Examiner has failed to provide either an adequate factual basis to support the parts of the argument listed *supra* in favor of a conclusion of *prima facie* obviousness. Instead, the Examiner appears to have relied improperly on Appellants' disclosure to explain why the claimed subject matter would have been obvious. "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *In re Fine*, 837 F.2d 1071, 1075 (Fed. Cir. 1988).

For example, Balaz teaches using little to no carbohydrate in its dry pet food because the more carbohydrate, the less meat-like texture (Balaz 4:25-31). The Balaz pet food has "a substantially fibrous stringy texture or . . . a substantially expanded texture" (Balaz 2:24-28). The van Lengerich particles are "generally uniform in size, dense, and granular" and "non-expanded, and exhibit a non-puffed, substantially non-cellular, dense structure" (van Lengerich 18:34-39) and typically have diameters measured in mm (*id.* 17:38-47). The Examiner has not explained what would have motivated a skilled artisan to pressure form a pet food base formulated to produce a fibrous stringy or substantially expanded meat-like textured pet food (Balaz) into a dense, granular, non-expanded solid tabletted pet food (van Lengerich). Indeed, the disparate characteristics of the foods taught by Balaz and van Lengerich appear to teach the ordinary worker following one to avoid the suggestions of the other. "A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the

reference, or would be led in a direction divergent from the path that was taken by Applicant." *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 877, 885 (Fed. Cir. 1998) (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)). Thus the factual basis of parts (i) and (iv) of the Examiner's argument is insufficient.

In addition, the Examiner appears to have extracted the base meal pet food formulation recited in Appellants' method claims as well as the specific protein, fat, and carbohydrate wt.% recited in Appellants' product claims by selective reading of the applied prior art references. For example, according to the Examiner, claim 1 and column 2, lines 45-48 of Balaz teach a base meal pet food formulation as set forth in the claimed invention. Column 2, lines 41-48, of Balaz reads "While the quantity of protein source, fat, and sugar, is considered to be within the skill in the art, a typical quantitative range of these ingredients includes from about 0 to about 35 percent protein source ingredient, from about 3 to about 15 percent fat, and from 0 to about 35 percent sugar." A protein source of from about 0 to about 35 percent is outside of the protein content of greater than about 50 wt.% recited in independent claims 1, 12, 18, and 24. It is improper to rely on the disclosure of "about 3 to about 15 percent fat" but disregard the disclosure of "about 0 to about 35 percent protein source ingredient," when both are the attributes of the same food product. The factual basis for part (i) of the Examiner's argument is also inadequate for this reason.

Further, van Lengerich does not appear sufficiently relevant to Fritz-Jung to be other than part of a hindsight reconstruction of the claimed subject matter. According to the Examiner, column 17, line 38, and column 22, lines 16-17, of van Lengerich establish its relevancy to pet foods (Ans.

9). The first citation relates to the importance of particle size, such as 1 mm versus 2 mm particles, in achieving controlled release of the encapsulated active component during passage of the product particles through the mouth, the stomach, and the intestine. The second citation relates to incorporating the van Lengerich's particles "into foods intended for human or animal consumption such as . . . animal feed, pet foods such as dog food and cat food, aqua-culture food foods such as fish food and shrimp feed," etc. (van Lengerich 22:8-24). The Examiner has not explained why these teachings relate to Fritz-Jung's process of extrusion, flaking, grinding the flakes, and then extruding the ground flakes and kibbling the re-extrudate. The factual basis for part (iv) of the Examiner's argument is also inadequate for this reason.

Finally, Miller discloses pressing a ground dough comprising about 50 to 75 wt.% farinaceous materials into the shape of a bone (Miller 2:17-65; 3:22-34 and 60-63; 4:13-15; 5:53 through 6:47). The Examiner has failed to show any correspondence between the application of pressure disclosed by Miller and the claimed compression forming and tabletting given the difference in carbohydrate content between Miller's ground dough and the base formulation recited in Appellants' method claims. Thus, part (iii) of the Examiner's argument lacks an adequate factual basis.

Accordingly, based on the foregoing, we REVERSE the rejection of claims 1, 3, and 5-30 under 35 U.S.C. § 103(a) as unpatentable over Fritz-Jung, Balaz, Miller, Colosimo, van Lengerich, Jewell, and Hodgkins.

IV. Order

Upon consideration of the record, and for the reasons given, it is

Appeal 2008-2184
Application 10/166,888

ORDERED that the decision of the Examiner rejecting claims 1, 3, and 5-30 under 35 U.S.C. § 103(a) as obvious over Fritz-Jung, Balaz, Miller, Colosimo, van Lengerich, Jewell, and Hodgkins is REVERSED; and,

FURTHER ORDERED that no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (2006).

REVERSED

BELL, BOYD & LLOYD, LLP
P.O. Box 1135
Chicago, IL 60690

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