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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/420,969	01/31/2017	Sarah E. Gorham	820278.P001U3	7057

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Culhane Meadows PLLC
534 Medlock Road Suite 103
Decatur, GEORGIA 30030

EXAMINER	
GEORGE, PATRICIA ANN	

ART UNIT	PAPER NUMBER
1793	

NOTIFICATION DATE	DELIVERY MODE
03/08/2018	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

eOfficeAction@AppColl.com
patent@culhanemeadows.com
sanderson@culhanemeadows.com

Office Action Summary	Application No. 15/420,969	Applicant(s) Gorham et al.	
	Examiner PATRICIA A GEORGE	Art Unit 1793	AIA Status Yes

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTHS FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☑ Responsive to communication(s) filed on 6/23/2017 .
☐ A declaration(s)/affidavit(s) under **37 CFR 1.130(b)** was/were filed on _____ .

2a)☐ This action is **FINAL.** 2b) ☑ This action is non-final.

3)☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on _____; the restriction requirement and election have been incorporated into this action.

4)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims*

5) ☑ Claim(s) 1-7 is/are pending in the application.
5a) Of the above claim(s) _____ is/are withdrawn from consideration.
6) ☐ Claim(s) _____ is/are allowed.
7) ☑ Claim(s) 1-7 is/are rejected.
8) ☐ Claim(s) _____ is/are objected to.
9) ☐ Claim(s) _____ are subject to restriction and/or election requirement

* If any claims have been determined allowable, you may be eligible to benefit from the **Patent Prosecution Highway** program at a participating intellectual property office for the corresponding application. For more information, please see http://www.uspto.gov/patents/init_events/pph/index.jsp or send an inquiry to **PPHfeedback@uspto.gov.**

Application Papers

10)☐ The specification is objected to by the Examiner.
11)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
Certified copies:
a)☐ All b)☐ Some** c)☐ None of the:
1.☐ Certified copies of the priority documents have been received.
2.☐ Certified copies of the priority documents have been received in Application No. _____.
3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

** See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☑ Notice of References Cited (PTO-892)
2) ☑ Information Disclosure Statement(s) (PTO/SB/08a and/or PTO/SB/08b) Paper No(s)/Mail Date _____.
3) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date _____.
4) ☐ Other: _____.

Notice of Pre-AIA or AIA Status

The present application, filed on or after March 16, 2013, is being examined under the first inventor to file provisions of the AIA.

Claim Objections

All claims are objected to for failing to use proper formatting. MPEP 608.01(i) states: Where a claim sets forth a plurality of elements or steps, each element or step of the claim should be separated by a line indentation. Also see 706.01 Contrasted With Objections [R-11.2013], for grounds for objection.

Specification Objection

On page 6 of the Disclosure, it is noted that it states: "the method described herein is substantially nutritionally balanced in accordance with generally accepted dietary principles and guidelines, such as the USDA Healthy Plate", which is unclear. A search of USDA does not disclose an object called "Healthy Plate". The Examiner's recommendation to Applicant is to amend the Specification to strike out this reference because it does not appear to exist.

Claim Rejections - 35 USC § 112

The following is a quotation of 35 U.S.C. 112(b):

(b) CONCLUSION.—The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.

The following is a quotation of 35 U.S.C. 112 (pre-AIA), second paragraph:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 1 and all claims dependent on it, are rejected under 35 U.S.C. 112(b) or 35 U.S.C. 112 (pre-AIA), second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor or a joint inventor, or for pre-AIA the applicant regards as the invention.

Regarding claim 1:

It is unclear as to how the term "processed" further limits the claim of preparing a food composition, since processed, by definition, merely imparts to prepare some particular actions, and therefore which makes such a claim redundant.

The term independent is a relative term, which renders the claim indefinite because it is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention because no point of relativity is provided for how much dependence on another for livelihood or subsistence constitutes independence.

It is unclear as to how the term "dining" further limits the claim of preparing a food, since it is toward the method of using the food prepared, not the preparation of the food itself; also, since all food is known to be edible this means it is for dining, which fails to further limit the claim of food.

It is unclear as to how the term "cooked" further limits the claim of prepared food, since by definition "cooked" means to prepare food.

It is unclear as to how the claim of a first quantity and one or more second quantities further limits a protein food and one or more other foods.

It is unclear as to what the scope of "combined in relative proportions such that said mixture is substantially nutritionally balanced according to dietary principles" imparts to the claims because:

"relative" is a relative term, because the pending specification and claims do not provide a point of relativity for how much relativity is required;

"proportions" is a relative term, because the pending specification and claims do not provide a point of relativity for how much of a proportion is required;

"substantially" is a relative term, because the pending specification and claims do not provide a point of relativity for how much is required to be substantial; and

"balanced" is a relative term, because the pending specification and claims do not provide a point of relativity for how much nutrition or what types are required for a food to be balanced.

It is unclear as to how the phrase "substantially graspable sizes and shapes" further limits the claim of food, since all food is graspable.

It is unclear as to how "suitable for eating" further limits the claim of food, since food is edible and therefore "suitable for eating".

It is unclear as to how the phrase "the steps of: further limits the claim of a method.

It is unclear as to how the term "food" after the terms: protein, carbohydrate and vegetable, further limit the claim of cooked foods.

It is unclear as to how the claim of sizes and shapes distinguish from each other because a shape is dependent on its size and visa-versa.

Claim 1 is also unduly broad thus making the scope unclear. For example:

1) The step of selecting two or more cooked foods comprising: protein; and carbohydrate or vegetable matter reads on anything cooked, including: any pasteurized/heated edible plant matter (i.e. vegetable), wherein one part encompasses protein and another the carbohydrate/vegetable; to a cooked herb ice cube; or even a popsicle made from pasteurized fruit juice.

2) The step of combining merely requires that the claimed food types are together in certain quantities, wherein such a combination offers nutrition, which read son any food comprising protein and carbohydrates, which includes all edible plant matter, meats and seafood, alone or in combination.

3) The step of shaping the combination, merely requires that the shaped product has a structure that is capable of being eaten, which everything edible reads on.

All of the limitations discussed above may also be presented in dependent claims 2-7, in which those claims are also indefinite for the reasons discussed above.

Claim Rejections - 35 USC § 112

The following is a quotation of 35 U.S.C. 112(d):

(d) REFERENCE IN DEPENDENT FORMS.—Subject to subsection (e), a claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed. A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.

The following is a quotation of pre-AIA 35 U.S.C. 112, fourth paragraph:

Subject to the following paragraph [i.e., the fifth paragraph of pre-AIA 35 U.S.C. 112], a claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed. A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.

Claim 7 and any claims depending on it, are rejected under 35 U.S.C. 112(d) or pre-AIA 35 U.S.C. 112, 4th paragraph, as being of improper dependent form for failing to further limit the subject matter of the claim upon which it depends, or for failing to include all the limitations of the claim upon which it depends.

Claim 1 is toward a method of preparing food, therefore it is unclear as to how a method of using the food prepared further limits the method of making it, as in claim 7. Further, since claim 7 is optional, it is not required and therefore does not further limit claim 1.

Applicant may cancel the claim(s), amend the claim(s) to place the claim(s) in proper dependent form, rewrite the claim(s) in independent form, or present a sufficient showing that the dependent claim(s) complies with the statutory requirements.

Claim Interpretation

Because of the multiple indefinite issues above, claim 1 will be construed as follows:

A method of preparing a food composition, comprising:

selecting two or more ingredients comprising:

protein, and

carbohydrates or edible parts of a plant;

combining said two or more ingredients into a mixture; and

shaping said mixture into said food composition;

wherein said food composition is suitable for eating and having one or more sizes or shapes.

With regard to the prior art, the phrase “processed food” encompasses anything edible (i.e. food) that has been prepared in some manner (i.e. processed).

With regard to the prior art, the phrase “menu items” encompasses food capable of being served.

With regard to the prior art, the phrases: “protein food”, “carbohydrate food” and “vegetable food” encompass food having an amount of protein, carbohydrate and edible matter from plants, respectively.

With regard to the prior art, the phrase "nutritionally" encompasses the inclusion of anything edible that obtains matter that is necessary for health and growth.

With regard to the prior art, the phrase "dietary" encompasses being edible.

With regard to the prior art, the phrase "dietary principles" encompasses a source of something edible.

With regard to the prior art, the phrase "for independent dining" encompasses for eating.

With regard to the prior art, the phrase "cooked" encompasses being prepared in some manner.

With regard to the prior art, the phrase "combined in relative proportions such that said mixture is substantially nutritionally balanced according to dietary principles" encompasses food with calories that is combined.

With regard to the prior art, the phrases: "protein food", "carbohydrate food" and "vegetable food" encompasses food comprising protein, carbohydrate and edible parts of a plant, respectively.

With regard to the prior art, the phrase "a mixture" encompasses a combination.

Claim Rejections - 35 USC § 102/103

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a)(1) the claimed invention was patented, described in a printed publication, or in public use, on sale or otherwise available to the public before the effective filing date of the claimed invention.

The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7 are rejected under 35 U.S.C. 102(a) 1(a)(1) as being anticipated, and in the alternative are rejected under 35 U.S.C. 103 as being unpatentable, over Stewart.

Stewart: Striped Ice Pops; published online at least by 6/14/2011, at: https://web.archive.org/web/20110614135526/https://www.marthastewart.com/349919/striped-ice-pops.

Independent Claim 1

Stewart teaches a method of preparing ice pops (i.e. a processed food composition for independent dining), comprising:

selecting vanilla yogurt mix, raspberry puree and nectar which provides two or more cooked (i.e. prepared) foods, comprising:

milk protein in the Greek yogurt (i.e. a protein food); and

one or more other foods selected from a group consisting of:

raspberry puree with sugar, a carbohydrate food; and

nectar, the edible portion of a plant which makes it a vegetable food;

combining said vanilla yogurt mix, raspberry puree and nectar, the two or more cooked (i.e. prepared) menu items (i.e. foods) into a mixture by combination one or two layers of each in the ice pop, comprising:

a first quantity of said vanilla yogurt mix, (i.e. protein food); and

one or more second quantities of said then raspberry puree (i.e. carbohydrates) and said nectar (i.e. the edible portion of a plant with makes it a vegetable food) as the one or more other foods;

wherein the mixture is combined in relative proportions (i.e. distinct layers) such that said mixture (i.e. combination of layers in the ice pop) is substantially nutritionally balanced according to dietary principles (i.e. comprising calories and other nutrients); and

freezing and shaping said mixture into an ice pop by using a mold (i.e. into a processed food composition suitable for eating and comprising one or more substantially graspable sizes and shapes). See the short article, including the Ingredients and Direction section.

It would have been obvious to one of skill in the art, at the time of filing/the invention to modify the method of making ice pops, as Stewart, to include that the Greek yogurt in the vanilla yogurt mix is a milk product and therefore is a protein food, as claimed, because Stewart illustrates the use of Greek yogurt which one of skill has the common knowledge that being a milk product, has milk proteins in it. Similarly the sugar in the raspberry puree is commonly known as a carbohydrate and the nectar from an apricot is commonly known to be from a fruit which is an edible portion of a plant and therefore a vegetable food.

In summary, applicant claims a formula for making a nutritional composition that uses or eliminates common ingredients, which does not amount to invention in the constantly developing art of preparing food because there is no specific showing that establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected and useful scientific function. It is long and commonly known that the object of for people of skill for cooking (e.g. cooks, chefs, and bakers) is to use or eliminate common ingredients to formulate food that is palatable of the consumer.

Such an act, the formulation or creation of* a food recipe, is not patentable because it does not make a scientific advancement in the field unless a new/novel reaction, coaction or cooperative relationship is made evident by such a creation. In other words, the act of making food or food recipes that taste good, even if the combination of the ingredients is not known or has not been done before, is not patentable subject just because it was done.

Further, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of this specific instant case.

At page 234, the Court stated as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

As for claim 2, Stewart teaches the use of all three of a protein food, carbohydrate food and vegetable food, as claimed. See the short article, including the Ingredients and Direction section.

As for claim 3, Stewart teaches the foods are used in quantities equal quantities of a few tablespoons (see Directions), which encompasses:

between about 30 to 60% by total weight of the food composition of the protein food;

between about 20% to about 40% by total weight of the food composition of a carbohydrate food; and

between about 20% to about 40% by total weight of the food composition of a vegetable food.

As for claim 4, Stewart teaches that the step of combining comprises one or more food-processing techniques, including stirring, food processing and sieving, which provides: grinding, chopping, blending, shredding, mixing, stirring, pureeing, grating, crushing, and slicing. See the short article, including the Ingredients and Direction section.

As for claim 5, Stewart teaches the step of shaping comprises one or more techniques, including: pouring, molding with a cover, and freezing; which provides molding and wrapping (i.e. covering) as claimed. See the short article, including the Ingredients and Direction section.

As for claim 6, Stewart teaches the step of shaping produces ten ice pops, which are illustrated to include one or more substantially graspable sizes and shapes, including: chunks, cylinders and sticks. See the picture of the short article and the Directions.

As for claim 7, Stewart illustrates the processed food composition have sticks, which means they may be eaten substantially without utensils and assistance. See the picture in the short article.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Howard (US 4,397,427) and Jordan (US 7,569,244 B2). Further, even a person chewing a spoonful of stew would read on such a claim as protein, carbohydrates and vegetables would be selected and them mixed and shaped in the mouth. Furthermore, an in-hospital mechanical diet, would also provide a dietary balanced amount of protein, carbohydrates and vegetable matter; or a potato chip made

from dough. It is the examiner's position, after spending much time on this and previously related cases, that there is nothing in the pending patent application that is novel or patentable.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PATRICIA ANN GEORGE whose telephone number is (571)272-5955. The examiner can normally be reached on T-TH 9:00 am - 5:00 pm.

Examiner interviews are available via telephone, in-person, and video conferencing using a USPTO supplied web-based collaboration tool. To schedule an interview, applicant is encouraged to use the USPTO Automated Interview Request (AIR) at http://www.uspto.gov/interviewpractice.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Emily Le can be reached on (571)272-0903. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov.

Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/PATRICIA A GEORGE/
Primary Examiner, Art Unit 1793