THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 HANNY KANAFANI, OSSAMA R ELNAKIO,
STACI L. HAYDEN, MICHAEL A. ALAGNA,
JAY E. BAUER and JAMES L. HILTON

Appeal No. 2004-0842
Application 09/539,454

ON BRIEF

Before PAK, OWENS, and KRATZ, Administrative Patent Judges.

PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1 through 17 and 43 through 47. Claims 18 through 42, the remaining claims in

the present application, stand withdrawn from consideration by the examiner as being directed to a non-elected invention. See Answer, page 3.

APPEALED SUBJECT MATTER

The appellants state (Reply Brief, page 3) that:

1. Group 1 - Claims 1-8 and 43-44 may be deemed to stand or fall together for purposes of this appeal.
2. Group 2 - Claims 9, 12-17, and 47 may be deemed to stand or fall together for purposes of this appeal.
3. Group 3 - Claims 45 and 46 may be deemed to stand or fall together for purposes of this appeal.

According to ***In re McDaniel***, 293 F.3d 1379, 1384, 63 USPQ2d 1462, 1465-66 (Fed. Cir. 2002), however, 37 CFR § 1.192(c)(7)(2002) does not give the U.S. Patent and Trademark Office

> ***carte blanche*** to ignore the distinctions between separate grounds of rejection and to select the broadest claim rejected on one ground as a representative of a separate group of claims subject to a different ground of rejection.

Therefore, for purposes of this appeal, we select claims 1, 5, 9, 15, 44, 46 and 47 as representing the claims subject to the different groupings and the different grounds of rejection set forth in the Answer and limit our discussion thereto consistent with 37 CFR § 1.192(c)(7) (2002). Claims 1, 5, 9, 15, 44, 46 and 47 are provided below:

1. A system for producing par-baked pizza crusts, comprising:

a mixer operable to mix a plurality of ingredients to produce pizza crust dough;

a sheeter operable to form the dough into a sheet;

a cutter operable to cut a plurality of dough portions out of the sheet;

a pan adapted to support a plurality of dough portions, the pan comprising a plurality of recesses, each recess adapted to receive a corresponding dough portion;

a proofer through which the pan travels to proof the dough portions;

a lid assembly positioned over the dough portions after the pan exits the proofer, the lid assembly comprising:

a frame comprising a plurality of elongate members; and

a plurality of lids mounted to the elongate members in an array, each lid being substantially separated from each other lid and corresponding to an associated recess of the pan; and

a first oven operable to par-bake the dough portions while the lid assembly is positioned over the dough portions to produce par-baked pizza crusts.

5. The system of Claim 1, further comprising a lidding apparatus operable to position the lid assembly over the dough portions.

9. A system for producing par-baked pizza crusts, comprising:

a pan adapted to support a plurality of dough portions, the pan comprising a plurality of recesses, each recess adapted to receive a corresponding dough portion;

a lid assembly positioned such that it contacts each dough portion, the lid assembly comprising a plurality of lids, each lid corresponding to an associated recess of the pan, each lid contacting a corresponding dough portion; and

an oven operable to par-bake the dough portions while the lid assembly contacts the dough portions to produce par-baked pizza crusts.

15. The system of Claim 9, further comprising a lidding apparatus operable to position the lid assembly to contact the dough portions.

44. The system of Claim 1, wherein the lids of the lid assembly include a plurality of apertures formed in the lids.

46. The system of Claim 9, wherein the lid assembly is of sufficient weight such that the lids compress the dough portions as the dough portions rise.

47. The system of Claim 9, wherein the lids of the lid assembly include a plurality of apertures formed in the lids.

PRIOR ART

The prior art references relied upon by the examiner are:

Smith	1,831,147	Nov. 10, 1931
Westover	4,208,441	Jun. 17, 1980
Killingbeck (Published UK Patent Application)	2 228 661 A	Sep. 5, 1990
Perkins (Published UK Patent Application)	2 289 431 A	Nov. 22, 1995

REJECTION

The appealed claims stand rejected as follows:

1. Claims 9 through 11, 45 and 46 under 35 U.S.C. § 102(b) as anticipated by Perkins;
2. Claims 1 through 4, 8 through 14 and 43 under 35 U.S.C. § 103 as unpatentable over the combined disclosures of Killingbeck and Perkins;
3. Claims 5 through 7 and 15 through 17 under 35 U.S.C. § 103 as unpatentable over the combined disclosures of Killingbeck, Perkins and Westover; and
4. Claims 44 and 47 under 35 U.S.C. § 103 as unpatentable over the combined disclosures of Killingbeck, Perkins and Smith.

OPINION

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments and evidence advanced by the examiner and the appellants in support of their respective positions. As a consequence of this review, we have made the determinations which follow[1].

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[1] We observe that the appellants question the propriety of the examiner's refusal to enter the amendments and Information Disclosure Statement (IDS) filed in the application. See the Brief, pages 2-4 and 6. We also observe that the examiner objects to claims 2, 3, 10 and 11 under 37 CFR § 1.75(c) as

ANTICIPATION

An anticipation under Section 102 is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of a claimed invention. ***See In re Spada***, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990); ***RCA Corp. v. Applied Digital Data Systems, Inc.***, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). The law of anticipation, however, does not require that the prior art reference teach what the appellants are disclosing, but only that the claims on appeal "read on" something disclosed in the prior art reference. ***See Kalman v. Kimberly-Clark Corp.***, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983).

The appellants have not disputed the examiner's finding that Perkins discloses an apparatus comprising a lower mould part 2 having a plurality of concavities 5 adapted to receive dough corresponding to the claimed pan having a plurality of recesses adapted to receive dough, an upper mould part 3 having a plurality of formers 8 corresponding to the claimed lid assembly having a plurality of lids and a baker's oven corresponding to

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"being of improper dependent form..." See the Answer, page 4. However, these issues are not properly before us since they are not appealable to this Board, but are reviewable by the Director of the U.S. Patent and Trademark Office on petition.

the claimed oven. Compare the Answer, pages 4-5, with the Brief and the Reply Brief in their entirety. The appellants also have not disputed the examiner's determination that the claimed functional language "producing par-baked pizza crusts" does not render the claimed system structurally different from the apparatus disclosed by Perkins. Compare the Answer, page 5, with the Brief and the Reply Brief in their entirety.

The appellants only argue that Perkins does not teach the claimed functionally defined position of lids, i.e., "the lid assembly positioned such that it contacts each dough portion, the lid assembly comprising a plurality of lids, each lid corresponding to an associated recess of the pan, each lid contacting a corresponding dough portion..." See the Brief, pages 8-9 and the Reply Brief, page 3. We are not persuaded by this argument.

We find that Perkins teaches that a spacing between the formers 8 corresponding to the claimed lids and the concavities 5 corresponding to the claimed recesses is a half of the spacing needed for preventing the plate of the upper mould part 3 from touching the rising dough in the concavities 5. See page 5, line 19 to page 6, line 5. We also find that Perkins teaches (page 3, lines 29-34 and page 7, lines 1-5) that its

> apparatus is provided with a clamping means, such as a set of clips round the edge of the mould, adapted to prevent the mould parts from separating as a result of the expanding characteristics of the rising dough during proving and baking.

Implicit in these teachings in Perkins is that the formers 8 of the upper mould part 3 corresponding to the claimed lids are positioned such that they contact the rising dough in the concavities as required by claim 9.

Even were we to determine that Perkins does not teach contact between the formers 8 and the rising dough portions, our conclusion would not be altered. We determine that the functional language used to define the position of the claimed lid system does not distinguish the position of the claimed lid system from that of Perkins' upper mould part 3 since the position of the claimed lid system is dependent on the thicknesses or sizes of dough portions in the recesses of the claimed pan, which thicknesses or sizes can be much greater than those taught in Perkins. Claim 9, for example, embraces employing dough portions having a thickness or size greater than 2 cm. This dough thickness or size requires that the position of the claimed lid system be located at greater than 2 cm above the recesses in the claimed pan, thus including the positions of the formers and/or plate specifically disclosed at page 5, line 19 to

page 6, line 5 of Perkins. In other words, we determine that the functionally defined position of the claimed lid system embraces the location of Perkins' upper mould part 3.

The appellants argue that Perkins does not teach that its upper mould part 3 "is of sufficient weight such that [formers 8] compress the dough portions as the dough portions rise" as required by claim 46. See the Brief, pages 9-10 and the Reply Brief, page 4. We do not agree.

It can be inferred from Perkins that the formers 8 of the upper mould part 3 provide some compression to the rising dough in the concavities 5 of the lower mould part 2 as indicated ***supra***. Moreover, Perkins teaches that its upper mould part 3 is made of the same material as the claimed lid system. Compare Perkins, 3, line 35 to page 4, line 4, with the specification, page 15. Thus, it is reasonable to conclude that the weight of Perkins' upper mould part 3 is sufficient to provide some compression to the rising dough in the concavities of its lower mould part 2 as required by the claims on appeal. The burden is on the appellants to demonstrate that the weight of the claimed lid system as defined by the claimed functional language is patentably different from that of Perkins' upper mould part 3. ***In re Schreiber***, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1432 (Fed.

Cir. 1997). However, on this record, the appellants have not carried their burden.

Under these circumstances, we are constrained to affirm the examiner's decision rejecting claims 9 through 11, 45 and 46 under 35 U.S.C. § 102(b) as anticipated by the disclosure of Perkins.

OBVIOUSNESS

The obviousness of an invention cannot be established by combining the teachings of the prior art references absent some teaching, suggestion or incentive supporting the combination. ***See ACS Hospital Systems, Inc. v. Montefiore Hospital***, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). This does not mean that the prior art references must specifically suggest making the combination. See ***B.F. Goodrich Co. V. Aircraft Braking Systems Corp.***, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); ***In re Nilssen***, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988)). Rather, the test for obviousness is what the combined teachings of the prior art references would have suggested to those of ordinary skill in the art. ***In re Young***, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); ***In re Keller***, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

CLAIMS 1-4, 9-14 and 43

The appellants have not disputed the examiner's finding that Killingbeck teaches using the claimed mixer, sheeter, cutter, oiler, proofer and oven in making pizza bases. The appellants also have not disputed the examiner's finding that Killingbeck teaches employing a pan and a lid assembly.

Recognizing that Killingbeck does not teach the claimed pan and lid assembly, the examiner relies on Perkins to teach the same. As indicated ***supra***, Perkins teaches the pan and lid assembly recited in claim 9. These pan and lid assembly, according to Perkins, can be used for any apparatus and method for proving and baking dough, which is inclusive of an apparatus and method forming pizza bases. See Perkins, page 1, lines 1-3, together with Killingbeck's apparatus and method requiring a proofer (proving) and an oven (baking) as indicated ***supra***. As is apparent from Perkins, its pan having a plurality of recesses (concavities in the lower mould part 2) and corresponding lid assembly having lids(the formers of the upper mould part 3) can be used to produce a plurality of baked products. In other words, Perkins teaches forming more baked products per pan than those produced by Killingbeck's pan.

Given the above teachings, we concur with the examiner that one of ordinary skill in the art would have been led to employ the pan and lid assembly of the type described in Perkins as the pan and lid assembly of the pizza base making apparatus taught by Killingbeck, motivated by a reasonable expectation of successfully "increasing the number of pizzas [sic., pizza bases] which can be prepared at one time." ***See In re Vaeck***, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). "[A] greater production rate [of pizza bases]" for a given time period would have motivated one of ordinary skill in the art to employ the pan and lid assembly of the type described in Perkins in the apparatus of Killingbeck. ***See In re Clinton***, 527 F.2d 1226, 1229, 188 USPQ 365, 367 (CCPA 1976)("Economics alone would motivate a person of ordinary skill in the art...").

It follows that the combined teachings of Killingbeck and Perkins would have rendered the subject matter of claims 9 through 14 obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103. Accordingly, we affirm the examiner's decision rejecting claims 9 through 14 under 35 U.S.C. § 103 as unpatentable over the combined teachings of Killingbeck and Perkins.

However, the examiner's rejection of claims 1 through 4, 8 and 43 as unpatentable over the combined teachings of Killingbeck and Perkins is on different footing. As pointed out by the appellants (Brief, page 15), the combination proposed by the examiner would not result in the subject matter recited in claims 1 through 4, 8 and 43. Specifically, we concur with the appellants that Killingbeck and Perkins do not teach the claimed "elongate members[2] in an array..." See also Figure 2. The examiner also has not explained how and why the combined teachings of Killingbeck and Perkins would have rendered the use of such features in the claimed subject matter obvious to one of ordinary skill in the art. Accordingly, we are constrained to reverse the examiner's decision rejecting claims 1 through 4, 8 and 43 under 35 U.S.C. § 103 as unpatentable over the combined teachings of Killingbeck and Perkins.

CLAIMS 5-7 AND 15-17

The disclosures of the Killingbeck and Perkins references have been discussed above and in the Answer. The examiner recognizes that they do not teach "two conveyors for reusing the

[2] The claimed elongate members are defined at pages 13-15 of the specification.

pans and lids, a lidding device, and a delidding device." See the Answer, page 7.

To remedy this deficiency, the examiner relies on the disclosure of Westover. The appellants do not dispute the examiner's finding that Westover teaches the claimed conveyors, lidding device and delidding device for making pizza shells (bases). Compare the Answer, page 7 with the Brief, pages 17-19 and the Reply Brief, pages 5-6. Consistent with the examiner's undisputed finding, we observe that Westover teaches two conveyors (10 and 12) wherein the conveyor 12 carries a bottom iron 26 corresponding to the claimed pan for receiving dough portions and the conveyor 10 places an upper iron 26 corresponding to the claimed lid assembly over the bottom iron 26 (lidding) before baking and then removes such upper iron (delidding) after baking. See column 3, line 4 to column 5, line 14, together with Figure 1. We find that Westover, like the appellants, teaches using these conveyers (including the claimed lidding and delidding devices) after dough is subjected to mixing, cutting and proofing. See Figure 5 in conjunction with column 5, line 31 to column 6, line 5. According to Westover (column 1, lines 45-46), its system is useful for "conveying the dough from inlet to outlet in a controlled time interval..."

Moreover, as is readily apparent from the teachings of Westover, the two conveyors described therein allow the reuse of the upper and bottom irons (lid assembly and pan) in a continuous manner to improve the production rate of pizza bases.

Under the circumstances recounted above, we concur with the examiner that one of ordinary skill in the art would have been led to employ the pan and lid assembly of the type described in Perkins in the pizza base making system of Westover, motivated by a reasonable of expectation of successfully improving the production rate of pizza bases due to using Westover's conveyors and Perkins' pan and lid assembly.[3] Thus, we affirm the examiner's decision rejecting claims 15 through 17 under 35 U.S.C. § 103 as unpatentable over the combined teachings of Killingbeck, Perkins and Westover.

However, the examiner's Section 103 rejection of claims 5 through 7 as unpatentable over the combined teachings of Killingbeck, Perkins and Westover is on different footing. As indicated ***supra***, Killingbeck and Perkins do not teach the claimed "elongate members in array". Westover does not remedy this deficiency in Killingbeck and Perkins. Yet, the examiner has not

[3] Killingbeck is cumulative since it, like Westover, teaches a mixer, a cutter, a proofer, and an oven for making pizza bases.

explained why or how the combined teachings of Killingbeck, Perkins and Westover would have suggested these features embraced by claims 5 through 7. Accordingly, we are again constrained to reverse the examiner's decision rejecting claims 5 through 7 under 35 U.S.C. § 103 as unpatentable over the combined teachings of Killingbeck, Perkins and Westover.

CLAIMS 44 and 47

The disclosures of Killingbeck and Perkins have been discussed above and in the Answer. With respect to claim 47, the examiner recognizes that Perkins does not teach that the formers 8 of the upper mould part 3 have a plurality of apertures.

To remedy this deficiency, the examiner relies on the disclosure of Smith. The appellants do not dispute the examiner's finding that "Smith teaches a baking system comprising plural recesses and lids... with apertures in the lids..." Compare the Answer, page 7, with the Brief, pages 19-20 and the Reply Brief, pages 5-6. We observe that Smith teaches that these lid apertures relieve "the internal pressure and [permit] the rise of gas bubbles in the dough beneath the cores." See page 1, lines 88-94.

Under these circumstances, we concur with the examiner that one of ordinary skill in the art would have been led to provide apertures in the formers of the upper mould part of the type described in Perkins, with a reasonable expectation of successfully obtaining the advantages indicated ***supra***. In reaching the above determination, we note that Perkins teaches employing apertures in its upper mould part 3 near the formers 8. However, we determine that one of ordinary skill in the art, recognizing an additional advantage that can be derived from employing additional apertures in the formers as indicated ***supra***, would have been led to the subject matter recited in claim 47. Accordingly, we affirm the examiner's decision rejecting claim 47 under 35 U.S.C. § 103.

With respect to claim 44, we note that it embraces the limitations of claim 1 since it is dependent thereon. As indicated ***supra***, Killingbeck and Perkins do not teach the claimed "elongate members in array". Smith does not remedy this deficiency in Killingbeck and Perkins. Yet, the examiner has not explained how and why the combined teachings of Killingbeck, Perkins and Smith would have rendered the subject matter of claim 44 obvious to one of ordinary skill in the art. Accordingly, we are constrained to reverse the examiner's decision rejecting

claim 44 under 35 U.S.C. § 103 as unpatentable over the combined teachings of Killingbeck, Perkins and Smith.

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

AFFIRMED-IN-PART

CHUNG K. PAK Administrative Patent Judge	)	
Terry J. OWENS Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
PETER F. KRATZ Administrative Patent Judge	)	

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