

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 NEW WORLD PASTA COMPANY

Appeal No. 2005-1466
Reexamination No. 90/006,515

ON BRIEF

Before GARRIS, FRANKFORT, and NAPPI, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

ON REQUEST FOR RECONSIDERATION

This is in response to a request, filed January 30, 2006, for rehearing of our decision, mailed November 30, 2005, wherein we sustained the examiner's § 102(b) rejection of the design claim on appeal as being anticipated by D'Apuzzo.

In the subject request, appellant reiterates the position advanced in the brief and reply brief which is, in essence, that the pasta design shown in Figure 1 of D'Apuzzo is inadequate to establish a prima facie case of anticipation for the appealed claim to an ornamental design for pasta. For example, on page 3 of the request, appellant presents the following argument:

Appeal No. 2005-1466
Reexamination No. 90/006,515

In this case, a person of average or ordinary intelligence would undoubtedly view New World's patent [i.e., the design claimed in the patent under reexamination] as a "different, and not a modified already-existing, design." *In re Bartlett*, 300 F.2d 942, 943-44 (C.C.P.A. 1962). The Board came to the opposite conclusion because it under-emphasized and/or did not appreciate the difference between D'Apuzzo and the claimed design.

We have again considered each of the appellant's previously advanced arguments which have now been reasserted in this request. However, in contrast to the belief expressed by appellant in the above quotation, the request for rehearing does not state with particularity any points which were, in fact, "misapprehended or overlooked by the Board" (37 CFR § 41.52(a)(1)(September 13, 2004)).

The appellant further argues that "[t]he Board also erred in its treatment of New World's expert declaration [i.e., the Hahn declaration of record]" (request, page 4). According to the appellant, "[i]n assessing the similarity of the designs here at issue, the Board neglected to give any weight to the declaration and concluded that this type of expert evidence has no place in the ordinary observer test" (*id.*, at pages 4-5). This is not correct.

Contrary to the appellant's afore-quoted statement, we considered, discussed and quoted from the Hahn declaration at several points in our decision (see the paragraph bridging pages 4 and 5, the last paragraph on page 6, the paragraph bridging pages 7 and 8, and the first full paragraph on page 8). From our perspective, these portions of our decision reveal the lack of merit in appellant's assertion that "the Board neglected to give any weight to the declaration and concluded that this type of

Appeal No. 2005-1466
Reexamination No. 90/006,515

STEVENS, DAVIS, MILLER & MOSHER, LLP
1615 L Street, N.W.
Suite 850
Washington, DC 20036

Mark D. Passler
AKERMAN SENTERFITT
P. O. Box 3188
West Palm Beach, FL 33402-3188

BRG/cam