

The opinion in support of the decision being entered today is not binding precedent of the Board.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

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Appeal No. 2006-3157  
Application No. 10/417,608

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ON BRIEF

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Before HANLON, TORCZON and DELMENDO, Administrative Patent Judges.

HANLON, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the final rejection of claims 1-22 and 27-29. Claims 23-26 and 30-33 are also pending. Claims 30-33 are allowed. See final Office action mailed March 21, 2005, p. 1. Claims 23-26 are objected to as being dependent upon a rejected base claim. See final Office action mailed March 21, 2005, p. 5.

Claim 1 is representative of the subject matter on appeal and reads as follows:

1. A refrigerator stable, unproofed chemically leavened bread or biscuit dough composition comprising interior dough comprising encapsulated basic chemical leavening agent and non-encapsulated acidic chemical leavening agent, wherein the interior dough does not brown normally during baking if the interior dough is at an exterior surface of the dough composition, and

wherein a surface of the dough composition browns normally during baking.

Rejections on appeal

- (1) Claims 1-25 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the applicant regards as the invention.<sup>1</sup>
- (2) Claims 1-3, 5-13, and 16-22 are rejected under 35 U.S.C. § 102(b) as being anticipated by Banks et al.<sup>2</sup>
- (3) Claims 4, 14, 15, and 27-29 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Banks.

Grouping of claims

As for the rejection of claims 1-25 under 35 U.S.C. § 112, second paragraph, the appellant argues the patentability of the claims as a group, focusing his arguments on claim 1.<sup>3</sup> Therefore, for purposes of this appeal, the patentability of claims 2-24 under 35 U.S.C. § 112, second paragraph, stands or falls with the patentability of claim 1.

As for the rejection of claims 1-3, 5-13, and 16-22 under 35 U.S.C. § 102(b), the appellant argues the patentability of these claims as a group. Therefore, for purposes of

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<sup>1</sup> In the final Office action, the examiner explained that claims 1, 8, 9, 11, 12, 16, and 19-21 are indefinite. Specifically, claims 1, 8, 16, and 21 were said to be indefinite for one reason, and claims 9, 11, 12, 19, and 20 were said to be indefinite for another reason. See final Office action dated March 21, 2005, pp. 2-3. In the Answer, the examiner withdrew the rejection of claims 9, 11, 12, 19, and 20 under 35 U.S.C. § 112, second paragraph. Answer, p. 3. However, claims 9, 11, and 12 are dependent on claim 1, and claims 19 and 20 are dependent on claim 16. Since claims 1 and 16 continue to be rejected under 35 U.S.C. § 112, second paragraph, claims 9, 11, 12, 19, and 20 also continue to be rejected under 35 U.S.C. § 112, second paragraph. See 37 CFR § 1.75(c) (2005) (“Claims in dependent form shall be construed to include all the limitations of the claim incorporated by reference into the dependent claim.”).

<sup>2</sup> U.S. Patent No. 4,828,853 granted on May 9, 1989 to Banks et al. (hereinafter “Banks”).

<sup>3</sup> The appellant notes that one of ordinary skill in the art would be able to ascertain the scope of claims 8, 16, and 21 for the same reasons that one of ordinary skill in the art would be able to ascertain the scope of claim 1. Brief, p. 13.

this appeal, the patentability of claims 2, 3, 5-13, and 16-22 under 35 U.S.C. § 102(b) stands or falls with the patentability of claim 1.

As for the rejection of claims 4, 14, 15, and 27-29 under 35 U.S.C. § 103(a), the appellant argues the patentability of claims 4, 14, and 15 separately and the patentability of claims 27-29 as a group. Therefore, for purposes of this appeal, the patentability of each of claims 4, 14, and 15 under 35 U.S.C. § 103(a) stands or falls alone, and the patentability of claims 28 and 29 under 35 U.S.C. § 103(a) stands or falls with the patentability of claim 27. See 37 CFR § 41.37(c)(1)(vii) (2005).

#### Background

Chemical leavening systems are often included in refrigerator stable dough compositions and generally include two chemical leavening agents, a basic agent and an acidic agent. These react during baking to produce a gas that leavens and expands (or “proofs”) the dough. Specification, p. 1, lines 23-26.

During refrigerated storage of these dough compositions, the two chemical leavening agents can contact each other and react prematurely causing premature gas release and premature expansion of the dough composition. When the dough is packaged in a low-pressure, substantially air-tight package, an undesired result of this premature evolution of leavening gas can be expansion of the package. Specification, p. 1 line 27-p. 2, line 2.

Attempts have been made to prevent undesired, premature contact between the chemical leavening agents. One technique is to encapsulate the basic agent with a material that acts as a barrier between the agent and the dough composition. Specification, p. 2, lines 3-9. A well encapsulated and stable basic agent was thought to

best prevent exposing the basic agent to the dough composition and prevent premature leavening of the dough product. Specification, p. 2, line 3-p. 3, line 2.

The appellant is said to have unexpectedly found that if encapsulation of the basic chemical leavening agent is too complete and durable, when used in combination with a slightly soluble non-encapsulated acidic chemical leavening agent, the surface of the dough composition does not brown well during baking. Specification, p. 3, lines 3-6. According to the appellant, inhibition of browning results from a reduced pH at the dough surface which is caused by some amount of non-encapsulated acidic agent dissolving in the dough during refrigerated storage. Since the basic agent is encapsulated, it is not available to neutralize the dissolved acidic agent and a reduced dough pH results. Specification, p. 3, lines 7-20.

In sum, while encapsulated basic chemical leavening agents beneficially provide a highly stable dough composition, they can have the unintended consequence of allowing dough pH to fall which can hinder and prevent normal browning at the surface of the dough. Specification, p. 4, lines 22-26.

#### The appellant's invention

Dough compositions according to the appellant's invention include a dough composition (referred to as "interior" dough) that is relatively stable during refrigerated storage. The interior dough includes an encapsulated basic chemical leavening agent that prevents the basic agent from becoming prematurely dissolved in the dough. Specification, p. 5, lines 1-5. Basic chemical leavening agents include sodium bicarbonate. Specification, p. 12, lines 13-15. The interior dough also includes a non-encapsulated acidic chemical agent that dissolves in the dough to some degree during

refrigerated storage and reduces pH of the dough composition. Specification, p. 5, lines 5-7. Acidic chemical leavening agents include sodium acid pyrophosphate and sodium aluminum phosphate. Specification, p. 10, lines 3-8. The resulting dough is refrigerator stable but has a reduced pH that can prevent normal browning during baking. Specification, p. 5, lines 9-14.

The invention further includes a dough surface that is formulated to brown normally during baking, e.g., a “browning” surface. Specification, p. 5, lines 19-26. This surface may be a basic agent, such as sodium bicarbonate, applied to the surface of the interior dough. Specification, p. 17, lines 18-24. The surface may also be another dough composition which includes a chemical leavening system containing non-encapsulated acidic chemical leavening agent and non-encapsulated basic agent. Specification, p. 18, line 26-p. 19, line 7.

According to the appellant, the inventive composition can be used to prepare any type of dough composition. Specification, p. 25, lines 17-18.

#### Banks

Banks discloses a dough composition comprising heat-activated fat-encapsulated leavening agents such as encapsulated sodium bicarbonate. Banks at col. 4, lines 10-13. The dough composition may also contain a chemical leavening acid such as sodium acid pyrophosphates and sodium aluminum phosphates. Banks at col. 5, lines 31-41. Banks discloses that the dough may be wrapped in another dough composition containing a conventional leavening system such as baking powder. Banks at col. 9, lines 28-31 and col. 11, lines 11-49. Banks specifically discloses that the dough composition may be used to make cookies. See, e.g., Banks at col. 9, lines 41-53.

Discussion

A. Rejection under 35 U.S.C. § 112, second paragraph

Claims 1-25 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the applicant regards as the invention. Specifically, the examiner explains (final Office action mailed March 21, 2005, p. 2):

[Claim 1] is contradicting because it recites that the interior dough does not brown normally and yet the surface browns normally; however, there is no distinct structural difference between the interior dough and the surface of the dough composition. The dough composition comprises the interior dough; thus, the surface is part of the interior dough.

The appellant argues (Brief, p. 11):

[C]laim 1 does make a structural distinction between the interior dough and a surface of the dough composition because claim 1 expressly recites an “interior dough” and a “surface of the dough composition.” In other words, the phrases “interior dough” and “surface of a dough composition” are distinct structural features of a dough that refer to different structural portions of a dough composition. The interior dough refers to the interior region of a dough composition. A surface of the dough composition refers to an exterior surface of the dough composition. [Underlining in original omitted.]

We disagree. Contrary to the appellant’s arguments, claim 1 does not specify that the “surface” at issue is the exterior surface of the dough composition. Rather, as the examiner explains, it is reasonable to interpret “a surface of the dough composition” as a surface of the interior dough. For this reason, the rejection of claim 1 under 35 U.S.C. § 112, second paragraph, is affirmed.<sup>4</sup>

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<sup>4</sup> The examiner also argues that the specification discloses a dual dough structure in which there is an inner dough wrapped in an outer dough and concludes that claim 1 is incomplete for omitting an essential element. See final Office action mailed March 21, 2005, p. 2. The appellant correctly points out that the  
(continued. . .)

The patentability of claims 2-24 stands or falls with the patentability of claim 1. Therefore, the rejection of claims 2-24 under 35 U.S.C. § 112, second paragraph, is also affirmed.

B. Rejection under 35 U.S.C. § 102(b)

Claims 1-3, 5-13, and 16-22 are rejected under 35 U.S.C. § 102(b) as being anticipated by Banks.

The examiner explains the prima facie case of anticipation as follows (final Office action mailed March 21, 2005, p. 4):

. . . Banks et al disclose a dough composition having the same structure and containing the same ingredients as claimed. The outer dough is the same as the surface of the dough composition. The outer dough contains conventional leavening agents which mean the agents are not encapsulated. The same agent is used for the dough surface as disclosed in the specification. Since the Banks et al dough is the same as the dough claimed, it is inherent the dough composition will have the properties such as refrigerator stability, browning characteristic . . . as claimed. The new limitation of a bread or biscuit dough does not define over Banks et al. The claims do not define what constitutes a biscuit dough. Biscuit, as defined in the Webster's 11 New Riverside University Dictionary, means "a cookie". The Banks et al dough is a cookie dough.

The appellant argues that Banks does not anticipate the claimed invention because Banks does not teach a bread or biscuit dough. The appellant points to The American Heritage College Dictionary which is said to define biscuit as a "Chiefly British" term for cookie.<sup>5</sup> The appellant argues that a British lay person may refer to a cookie as a biscuit, but the average American lay person does not. The appellant also attempts to draw a

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( . . . continued )

exterior surface is not limited to this embodiment but may also include a basic agent topically applied to the surface of the interior dough. Specification, p. 17, lines 18-24. Therefore, we agree with the appellant that claim 1 does not omit an essential element.

<sup>5</sup> A copy of the portion of The American Heritage College Dictionary relied on by the appellant has not been provided with the brief.

distinction between bread and biscuit dough and cookie dough. According to the appellant, bread and biscuit dough is relatively airy whereas cookie dough is relatively dense. Brief, pp. 15-16.

The appellant has not directed us to any credible evidence which establishes how one of ordinary skill in the art would have interpreted the term “biscuit” in the context of claim 1. The appellant has also failed to direct us to any credible evidence which discusses the alleged textural differences between bread and biscuit dough and cookie dough. Therefore, the appellant’s arguments amount to nothing more than attorney argument. See In re Schulze, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965) (arguments in the brief do not take the place of evidence in the record).

The examiner correctly points out that the claims do not recite any compositional or structural feature that distinguishes a biscuit dough from a cookie dough. Answer, pp. 7-8. The specification also fails to make a distinction. See Specification, p. 25, lines 17-18 (the inventive compositions can be used to prepare any type of dough compositions). We find that in the baking art, the line between a biscuit and a cookie is not as bright as the appellant would like us to draw. For example, we find that one of ordinary skill in the art would have considered “biscotti” to be either a biscuit or a cookie. Thus, giving claim 1 its broadest reasonable interpretation consistent with the specification, it is reasonable to interpret “biscuit” as including “cookie.” See In re Morris, 127 F.3d 1048, 1053-54, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997) (claims given “broadest reasonable interpretation” during prosecution).

For the reasons set forth above, the rejection of claim 1 under 35 U.S.C. §102(b) as being anticipated by Banks is affirmed.

The patentability of claims 2, 3, 5-13, and 16-22 stands or falls with the patentability of claim 1. Therefore, the rejection of claims 2, 3, 5-13, and 16-22 as being anticipated by Banks is also affirmed.

C. Rejections under 35 U.S.C. § 103(a)

1. Claim 4

Claim 4 reads as follows:

The composition of claim 1 wherein the encapsulated basic chemical leavening agent comprises soda bicarbonate encapsulated in vegetable oil.

The examiner indicates that Banks does not disclose the limitation recited in claim 4. Nevertheless, the examiner maintains that it would have been obvious to one skilled in the art to encapsulate the soda bicarbonate in vegetable oil because it is well known in the art to encapsulate a leavening agent in vegetable oil. Answer, p. 5.

The appellant does not dispute that it would have been obvious to one of ordinary skill in the art to encapsulate soda bicarbonate in vegetable oil. Rather, the appellant notes that claim 4 depends from claim 1 and argues that certain limitations in claim 1 are not suggested by the teachings in Banks. See Brief, pp. 18-22.

We decline to address the appellant's arguments relating to the obviousness of claim 1 in view of the teachings in Banks because claim 1 is not rejected under 35 U.S.C. §103(a). See Answer, p. 9 ("appellant's grouping of claim 1 within the argument for the 103 rejection is not understood because claim 1 is rejected under 102").

The appellant does not dispute the obviousness of "soda bicarbonate encapsulated in vegetable oil" as recited in claim 4. Therefore, the rejection of claim 4 under 35 U.S.C. §103(a) as being obvious over Banks is affirmed.

2. Claim 14

Claim 14 is dependent on claim 1 and recites that the dough composition is “packaged in low pressure packaging.”

The appellant argues that Banks does not teach a dough composition packaged in low pressure packaging as claimed. Furthermore, the appellant argues that Banks does not even mention packaging a dough composition. Brief, p. 22.

The admitted prior art recognizes that premature contact of basic chemical leavening agent and acidic chemical leavening agent causes premature gas release and premature expansion of the dough composition. When the dough is packaged in low pressure packaging, the admitted prior art further recognizes that premature evolution of leavening gas causes expansion of the package. However, it was known to encapsulate a chemical leavening agent with a barrier material to prevent premature contact between leavening agents, thereby preventing premature release of leavening gas and expansion of the dough. Specification, p. 1, line 27-p. 2, line 9.

As discussed above, the dough composition disclosed in Banks includes encapsulated sodium bicarbonate. Banks at col. 4, lines 10-13. Based on the admitted prior art, one of ordinary skill in the art would have known that a dough composition, such as in Banks, which contains an encapsulated basic agent and a non-encapsulated acidic agent would not prematurely expand due to premature contact between the two agents and could be packaged in a low pressure package. We find that one of ordinary skill in the art would have known that low pressure packaging is cheaper than pressurized packaging or packaging that includes a pressure relief valve. Therefore, economic reasons would have motivated the proposed modification. See In re Thompson, 545 F.2d

1290, 1294, 192 USPQ 275, 277 (CCPA 1976) (economic factors alone would have motivated one of ordinary skill in the art to use the claimed invention).

The rejection of claim 14 under 35 U.S.C. § 103(a) is affirmed.

3. Claim 15

Claim 15 reads as follows:

The composition of claim 14 wherein the chemical leavening agents do not react sufficiently during 8 weeks of storage at 45 degrees Fahrenheit to substantially expand the packaging.

The appellant argues that Banks does not teach, motivate, or suggest such a packaged dough composition. Brief, p. 23.

It was known to make chemical leavening systems as stable as possible by using a basic chemical leavening agent having a high degree of encapsulation. Specification, p. 2, lines 26-30. Thus, one of ordinary skill in the art would have recognized that storage time is a result effective variable. In other words, based on the admitted state of the art, one of ordinary skill in the art would have known that the more encapsulated the basic agent is, the more stable the chemical leavening system will be and the longer the package can be stored before leavening gas is created and the dough and packaging expand. For this reason, we find that the storage conditions recited in claim 15 would have been within the ordinary skill in the art. Cf. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980) (the discovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art).

The rejection of claim 15 under 35 U.S.C. § 103(a) is affirmed.

4. Claims 27-29

Claim 27 reads as follows:

A refrigerator stable, unproofed chemically leavened dough composition comprising interior dough comprising encapsulated basic chemical leavening agent and non-encapsulated acidic chemical leavening agent, wherein the interior dough does not brown normally during baking if the interior dough is at an exterior surface of the dough composition, wherein a surface of the dough composition browns normally during baking, and wherein the composition is packaged in low pressure packaging.

As discussed above, the examiner explains that Banks discloses a dough composition having the same structure and containing the same ingredients as claimed. Since the dough disclosed in Banks is the same as the dough claimed, the examiner concludes that the dough composition disclosed in Banks is inherently refrigerator stable and inherently has the same browning characteristics as the claimed dough composition. See Answer, pp. 4-5.

The appellant argues that Banks does not inherently describe an interior dough that is refrigerator stable because the basic agent in the claimed dough composition is highly encapsulated whereas the encapsulated basic agent disclosed in Banks “could have a relatively low degree of encapsulation.” Similarly, the appellant argues that the dough composition disclosed in Banks does not inherently have the same browning characteristics as the claimed dough composition because the encapsulated leaveners disclosed in Banks “could have a relatively low degree of encapsulation.” See Brief, p. 23; see also Brief, pp. 18-21.<sup>6</sup>

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<sup>6</sup> The appellant also argues that Banks does not motivate or suggest a refrigerator stable dough or a dough having the claimed browning properties. As for the refrigerator stability and the browning properties of the dough described in Banks, this portion of the rejection is based on inherency, not obviousness. See  
(continued . . .)

Significantly, claim 27 does not specify the degree of encapsulation of the basic chemical leavening agent. Furthermore, the appellant has not directed us to any credible evidence which establishes that the encapsulated basic agent disclosed in Banks would not be sufficiently encapsulated to impart refrigerator stability to the dough composition. Likewise, the appellant has not directed us to any credible evidence which establishes that the encapsulated basic agent disclosed in Banks would not be sufficiently encapsulated to impart the claimed browning characteristics to the dough composition. See Schulze, 346 F.2d at 602, 145 USPQ at 718 (arguments in the brief do not take the place of evidence in the record).

The appellant also argues that Banks does not teach, motivate, or suggest packaging a dough composition in low pressure packaging as discussed with respect to the rejection of claim 14. Brief, p. 23. We disagree for the reasons set forth in affirming the rejection of claim 14.

The rejection of claim 27 under 35 U.S.C. § 103(a) as being obvious over Banks is affirmed. The patentability of claims 28 and 29 stands or falls with the patentability of claim 27. Therefore, the rejection of claims 28 and 29 under 35 U.S.C. § 103(a) as being obvious over Banks is also affirmed.

D. Suggested amendment under 37 CFR § 41.50(c)

Claims 1, 8, 16, and 21 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter

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(. . . continued)

Answer, p. 8 (“The rejection takes the position that the storage stability and browning characteristics are inherent in the Banks et al dough because they disclose dough containing the same ingredients as claimed.”). Therefore, we dismiss this argument as irrelevant.

which the applicant regards as the invention. Specifically, the examiner explains that claim 1 (Answer, p. 3):

[D]oes not differentiate the interior dough and the surface of the dough composition. The claim is contradicting because it recites that the interior dough does not brown normally and yet the surface browns normally; however, there is no distinct structural difference between the interior dough and the surface of the dough composition. The dough composition comprises the interior dough; thus, the surface is part of the interior dough.

Claims 8, 16, and 21 are indefinite for the same reason. See Answer, p. 3.

In claim 1, it is clear that “a surface of the dough composition” is the exterior surface of the dough composition. See Brief, p. 11 (“A surface of the dough composition refers to an exterior surface of the dough composition.”). Likewise, it is clear that “a dough surface” and “the dough surface” in claim 8, “a surface of the dough” in claim 16, and “dough surface” in claim 21 refer to the exterior surface of the dough composition.

Therefore, the rejection under 35 U.S.C. § 112, second paragraph, may be overcome by amending claims 1, 8, 16, and 21 as follows:<sup>7</sup>

In claim 1, line 6, amend “a surface of the dough composition” to read --the exterior surface of the dough composition--.

In claim 8, line 2, amend “a dough surface” to read --the exterior surface of the dough composition--. In claim 8, line 4, amend “the dough surface” to read --the exterior surface of the dough composition--. In claim 8, lines 4-5, amend “the dough surface” to read --the exterior surface of the dough composition--.

In claim 16, line 10, amend “a surface of the dough” to read --the exterior surface of the dough composition--.

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<sup>7</sup> We refer to claims 1, 8, 16, and 21 in the Appendix to the Brief.

In claim 21, lines 2-3, amend “a dough surface” to read --an exterior dough surface--. In claim 21, line 6, amend “a dough surface to read –the exterior dough surface--. In claim 21, line 7, amend “dough surface” to read --the exterior dough surface--.

E. Observations

1. Claims 9, 11, 12, 19, and 20

In the final Office action, the examiner rejected claims 9, 11, 12, 19, and 20 under 35 U.S.C. § 112, second paragraph, as being vague and indefinite. See final Office action mailed March 21, 2005, p. 2. The examiner withdrew the rejection in the Answer but did not provide an explanation. See Answer, p. 3. A review of these claims on appeal reveals that the claims may indeed be indefinite.

Claims 9, 11, and 19 recite a dough surface pH in the range from 6 to 8, and claims 12 and 20 recite a dough surface pH in the range from 6.5 to 7.5. It is unclear whether the “dough surface” refers to the surface of the interior dough or the exterior surface of the dough composition.

According to the appellant’s specification, browning occurs at a pH from 6 to 8, preferably at a pH between 6.5 and 7.5. Specification, p. 3, lines 26-27. If the “dough surface” in claims 9, 11, 12, 19, and 20 refers to the surface of the interior dough, the interior dough surface would have a pH that allows the surface to brown during baking. However, according to claim 1, “the interior dough does not brown normally during baking if the interior dough is at an exterior surface of the dough composition.” Similarly, according to claim 16, “the interior dough exhibits a pH during baking that

prevents the interior dough from browning normally during baking if the interior dough were at an exterior surface of the dough composition.”

In the event of further prosecution, the examiner should reconsider whether claims 9, 11, 12, 19, and 20 are indefinite under 35 U.S.C. § 112, second paragraph.

2. Claim 27

Claim 27 appears to be indefinite for the same reasons that claim 1 is indefinite. Specifically, claim 27 recites that “the interior dough does not brown normally during baking if the interior dough is at an exterior surface of the dough composition.” Claim 27 also recites that “a surface of the dough composition browns normally during baking.” If “a surface of the dough composition” is interpreted as a surface of the interior dough, the claim appears to be contradictory. In the event of further prosecution, the examiner should consider whether claim 27 is indefinite under 35 U.S.C. § 112, second paragraph.

3. Claims 23-25

Claims 23-25 have been objected to as being dependent upon a rejected claim. The examiner has indicated that the claims would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. See final Office action mailed March 21, 2005, p. 5. However, claims 23-25 have been rejected under 35 U.S.C. § 112, second paragraph, and that rejection has been affirmed on appeal.

Claim 23 depends from claim 21, and claims 24 and 25 depend from claim 23. If claim 21 is amended as suggested in the previous section of this decision, the rejection of claims 21 and 23-25 under 35 U.S.C. § 112, second paragraph, would be overcome. However, if the appellant does not amend claim 21 as suggested, claims 21 and 23-25

would remain unpatentable under 35 U.S.C. § 112, second paragraph, and the examiner should consider withdrawing the objection of claims 23-25.

4. Claim 26

Claim 26 has been objected to as being dependent upon a rejected claim. The examiner has indicated that the claim would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. See final Office action mailed March 21, 2005, p. 5.

Claim 26 depends from claim 23 which depends from claim 21. Claim 23 has been rejected under 35 U.S.C. § 112, second paragraph, and that rejection has been affirmed on appeal. Depending on whether claim 21 is amended as suggested in the previous section of this decision, the examiner should consider whether claim 26 should be rejected under 35 U.S.C. § 112, second paragraph, and whether the objection of claim 26 should be withdrawn. See 37 CFR § 1.75(c) (2005) (“Claims in dependent form shall be construed to include all the limitations of the claim incorporated by reference into the dependent claim.”).

Conclusion

The rejection of claims 1-25 under 35 U.S.C. § 112, second paragraph, is affirmed. The rejection of claims 1-3, 5-13, and 16-22 under 35 U.S.C. § 102(b) is affirmed. The rejection of claims 4, 14, 15, and 27-29 under 35 U.S.C. § 103(a) is affirmed.

Appeal No. 2006-3157  
Application No. 10/417,608

No time period for taking any subsequent action in connection with this appeal  
may be extended under 35 U.S.C. § 1.136(a).

AFFIRMED

/ADRIENE LEPIANE HANLON/ )  
Administrative Patent Judge )  
 )  
 ) BOARD OF PATENT  
/RICHARD TORCZON/ )  
Administrative Patent Judge ) APPEALS AND  
 )  
 ) INTERFERENCES  
/ROMULO H. DELMENDO/ )  
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Appeal No. 2006-3157  
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