

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

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MIHAELOS N. MIHALOS, ALLISON ANTONINI,  
CAROL WINES, GARY A. LEWIS,  
JENNIFER K. THOMAS, KRISTINE GERARD,  
JULIA LEIGH DESROCHERS, and  
ZENA E. FORTE

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Appeal 2007-1390  
Application 10/842,392  
Technology Center 1700

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Decided: May 16, 2007

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Before EDWARD C. KIMLIN, THOMAS A. WALTZ, and  
CATHERINE Q. TIMM, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's final rejection of claims 1-15, which are the only claims pending in this application. We have jurisdiction pursuant to 35 U.S.C. § 6.

According to Appellants, the invention is directed to a process for preparing filled cracker snacks comprising the preparation of a smooth, textured, bakable filling comprising an oil phase, an aqueous phase, and a solids phase by blending the filler ingredients and mixing with shear sufficient to effect emulsification and form a homogeneous filler with a specified viscosity (Br. 3). The process further includes the steps of preparing top and bottom sheets of dockered cracker dough, moving the bottom sheet along a supported surface while depositing a plurality of streams of the bakable filling from a depositor, placing the top sheet of dockered dough over the bottom sheet with the fillings thereon, applying pressure to seal the filling between the two sheets of dough, and baking the composite (*id.*). Representative independent claim 1 is reproduced below:

1. A process for preparing filled cracker snacks containing a creamy, lubricious low  $A_w$  and bake stable filler encased within crisp oven-baked cracker, comprising:

preparing a smooth textured bakable filling comprising an oil phase, an aqueous phase and a solids phase by a process comprising blending filler ingredients and mixing with shear sufficient to effect emulsification and form a homogeneous filler having a viscosity of greater than  $1.5 \times 10^5$  centipoise;

preparing top and bottom sheets of dockered cracker dough;

moving a bottom sheet of dockered cracker dough along a supported surface at a predetermined horizontal velocity;

depositing a plurality of streams of said [bakable filling] onto the bottom sheet of dough from a depositor comprising a plurality of openings by causing the filling to flow at a predetermined rate from each of the plurality of openings;

placing said top sheet of dockered cracker dough over the bottom sheet of cracker dough having the bakable filling in a regular pattern thereon;

applying pressure to the dough sheets in predetermined areas to seal the bakable filling between the sheets of dough in a perimeter around discrete portions of bakable filling and to cut and/or score the dough in a predetermined pattern to form a composite unbaked dough and filling; and

baking the composite sufficiency to provide a crisp outer crust that exhibiting [sic, exhibits] textural and microbiological stability.

The Examiner has relied on the following references as evidence of obviousness:

Thulin	US 4,618,498	Oct. 21, 1986
Morano	US 5,723,164	Mar. 03, 1998

#### ISSUES ON APPEAL

Claims 1-15 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Morano in view of Thulin (Answer 3).

Appellants contend that Morano describes a shear thinning filling for use in cookie dough, and these fillings are not of the type claimed and the dough is not cracker dough (Br. 6).

Appellants contend that Morano teaches co-extruding or co-laminating but there is no description of anything other than co-extrusion (Br. 6).

Appellants contend that the fillings of Morano are exemplified as fat-free or low fat, which is contrary to the present invention which requires a “significant” oil phase (Br. 7).

Appellants contend that the jelly of Thulin and manner of applying it are different than the invention, where a uniform stream is required which can not be deposited by the jelly dispensers 32 of Thulin (Br. 7).

Appellants contend that the references can not be combined “without changing their essential features and adding features shown or suggested by none” (Br. 8).

The Examiner contends that Morano discloses a filling made by co-lamination, where the filling is used with cracker dough, and contains an oil phase (Answer 3-4 and 6).

The Examiner contends that Thulin teaches a process for preparing composite products such as filled crackers using a depositor that deposits a plurality of streams of filling, Morano discloses a filling used in cracker products, and a co-laminating process useful in the final product preparation, thus suggesting to one of ordinary skill in this art to use the method taught by Thulin to prepare the filled cracker product disclosed by Morano (Answer 4 and 6).

Accordingly, the issues presented from the record in this appeal are as follows: (1) does Morano disclose, teach, or suggest the filling as required by claim 1 on appeal?; (2) does Thulin disclose, teach, or suggest the process of preparing the filled cracker product as required by claim 1 on appeal?; and (3) has the Examiner properly combined the teachings of these references to disclose, teach, or suggest all the limitations of claim 1 on appeal?

We determine that the Examiner has established a *prima facie* case of obviousness in view of the reference evidence, which *prima facie* case has not been adequately rebutted by Appellants’ arguments. Therefore, we

AFFIRM the sole ground of rejection in this appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.<sup>1</sup>

## OPINION

We determine the following factual findings from the record in this appeal:

- (1) Morano discloses an edible, bakable filling with low A<sub>w</sub> that can be used for making multi-layered food compositions where the outer layers are a bakery dough, and the co-extruded or co-laminated product has a long shelf life (Abstract; col. 1, ll. 13-14, 27-29, and 45-47; col. 4, ll. 6-13);
- (2) Morano teaches that the edible filling composition includes a hydrophilic liquid phase, an edible solids phase, and small amounts of a fat/oil phase, including an example to a low-fat, cheese-flavored filling (col. 3, ll. 44-51; col. 4, ll. 25-27; col. 10, ll. 30-42 and 51-52; col. 11, ll. 15-18; and col. 12, ll. 8-10);
- (3) Morano teaches that the edible filling is “particularly useful” in the production of filled bakery products such as crackers, and the method of preparation involves filling or otherwise combining an uncooked dough with the thermostable filling and then cooking the combination (col. 3, ll. 52-55; and col. 3, l. 67-col. 4, l. 3);
- (4) Thulin discloses a method of continuously forming individual product pieces having a filler therein, where a first flat dough sheet is provided, a natural/artificial filler is periodically deposited on this first sheet, then the first sheet with filler is enclosed by a

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<sup>1</sup> We note that we have also considered related US Patents Nos. 6,863,911; 6,905,719; and 6,905,720 (*see* the Specification, ¶ [0001]).

second flat dockered dough sheet, the combined sheets are crimped or pressed to seal the edges, and the product is divided and baked to produce a food product with long storage stability (Abstract; col. 1, l. 57-col. 2, l. 37; col. 3, ll. 22-29; col. 7, l. 67-col. 8, l. 2; and col. 8, ll. 9-10); and

- (5) Thulin teaches that any conventional cracker dough can be used, any dough formula can be used, the filling may be jelly or “other conventional filling,” and a plurality of filler dispensers can be used (col. 3, ll. 30-31; col. 5, ll. 43-48; and col. 5, ll. 54-57).

When relying on multiple references to establish obviousness, the Examiner must do more than show that each of the elements of the thing claimed was independently known in the prior art, rather, it is incumbent upon the Examiner to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed invention does. *See KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385, 1396 (2007). Examples in a reference are merely that, exemplary of the broader disclosure, all of which is available for all that it discloses, teaches, or suggests to one of ordinary skill in the art. *See In re Widmer*, 353 F.2d 752, 757, 147 USPQ 518, 523 (CCPA 1965); *see also In re Lamberti*, 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976).

Applying the preceding legal principles to the factual findings in the record of this appeal, we determine that the Examiner has established a *prima facie* case of obviousness which has not been adequately rebutted by Appellants’ arguments. As shown by factual findings (1) and (3) listed above, we determine that Morano discloses filled bakery products such as crackers where a filling is placed in the multilayer bakery product with the

outer layers being dough, prepared by a co-lamination process to yield final products with a long shelf life. As shown by factual finding (2) listed above, we determine that Morano teaches fillings used in these filled cracker products that include an aqueous phase, a solids phase, and an oil phase, with the ingredients being blended and mixed under shear with emulsifiers. We note that the disclosure of Morano, contrary to Appellants' arguments (Br. 6-7), is not limited to its specific examples but is available for all that it discloses, teaches, or suggests to one of ordinary skill in this art. *See Widmer, supra.*

As shown by factual finding (4) listed above, we determine that Thulin discloses the processing steps of preparing the top and bottom sheets of dough, depositing a plurality of streams of filling, placing the top sheet over the filled bottom sheet, applying pressure to seal the filling between the sheets, cutting or scoring the dough, and baking the composite, as required by claim 1 on appeal.<sup>2</sup> As shown by factual finding (5) listed above, we determine that Thulin teaches that the process is applicable to cracker dough using any "other conventional filling." Therefore we determine that one of ordinary skill in this art would have used the method taught by Thulin to produce the filled cracker products of Morano, since both references are directed to filled cracker products made by co-lamination of cracker dough to achieve long shelf life. Conversely, we determine that it would have been obvious to use the filling taught by Morano as the "conventional filling" in the process disclosed by Thulin to make a composite filled cracker product.

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<sup>2</sup> We note that Appellants base no argument on any specific claim (*see* the Brief in its entirety). Therefore we limit our discussion to independent claim 1.

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Accordingly, we determine that the Examiner has established a proper reasoned analysis for combining the references as proposed.

For the foregoing reasons and those stated in the Answer, we affirm the Examiner's rejection of claims 1-15 under § 103(a) over Morano in view of Thulin.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

tf/lS

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