

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 PEEYUSH MAHESHWARI, MARY J. REED,
THOMAS CRAIG HOESE, ESSAM WAHBAH,
NICHOLAS D. KOVICH, HEIDI L. NELSON
and JAMES N. WEINSTEIN

Appeal 2007-1528
Application 10/360,991
Technology Center 1700

Decided: May 16, 2007

Before EDWARD C. KIMLIN, PETER F. KRATZ, and
CATHERINE Q. TIMM, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-7, 9, and 32.

Claim 1 is illustrative:

1. A microwaveable dough product containing a filling, said product comprising:

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a) pre-cooked dough comprising flour, water, and corn meal dispersed within said dough; and

b) a sweet or savory filling comprising a boil out reducing agent, where said boil out reducing agent comprises bread crumbs having an average particle size of from about 1 mm to 7 mm, wherein said bread crumbs reduce boil out of the filling from inside the pre-cooked dough when the pre-cooked dough is reheated during a microwave heating process.

The Examiner relies upon the following references as evidence of obviousness:

Lee	US 5,059,433	Oct. 22, 1991
Pesheck	US 5,576,036	Nov. 19, 1996
Bongiovanni	US 5,897,895	Apr. 27, 1999
Hayes-Jacobson	US 5,965,186	Oct. 12, 1999

Appellants' claimed invention is directed to a microwaveable dough product containing a filling wherein the filling comprises a boil out reducing agent which keeps the filling from boiling out of the dough product during microwave heating. The boil out reducing agent comprises bread crumbs.

Appealed claims 1-7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hayes-Jacobson in view of Lee, Pesheck and Bongiovanni. Claims 9 and 32 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hayes-Jacobson in view of Lee and Pesheck.

Appellants do not provide separate arguments for any particular claim on appeal. Also, Appellants' argument against the separate rejection of claims 9 and 32 is the same as the argument against the rejection of claims 1-7. Accordingly, all the appealed claims stand or fall together with claim 1.

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We have thoroughly reviewed Appellants' arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejections for essentially those reasons expressed in the Answer, and we add the following primarily for emphasis.

Appellants do not dispute the factual determinations of the Examiner with respect to the disclosure of Hayes-Jacobson. As recognized by the Examiner, Hayes-Jacobson does not disclose a dough comprising cornmeal and a filling comprising bread crumbs. Appellants do not take issue with the Examiner's legal conclusion that it would have been obvious for one of ordinary skill in the art, based on Bongiovanni, to add cornmeal to the dough of Hayes-Jacobson. Also, Appellants make no argument that it would have been nonobvious, based on the disclosures of Lee and Pesheck and the state of the prior art, to add bread crumbs to the product of Hayes-Jacobson. Rather, the sole argument advanced by Appellants is that none of the references provides "any insight or instruction to one of skill in the art that the inclusion of bread crumbs inside a pre-cooked dough will help to reduce boil-out of an internal filling during microwave heating of a microwavable dough product" (Br. 11, penultimate para.).

The Examiner appreciates that neither Lee nor Pesheck teaches that the inclusion of bread crumbs functions as a boil out reducing agent which

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maintains the filling inside the dough product. However, the Examiner properly states that it is not necessary for a finding of obviousness that the prior art recognizes all the inherent properties of a known component or ingredient in a composition. It is well settled that the motivation of the skilled artisan need not be the same as an applicant's motivation for a finding of obviousness. *In re Kemps*, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996). Also, it is not necessary for a conclusion of obviousness that the prior art recognizes all the advantages of a composition that is within the prior art. The mere discovery and claiming of a new benefit of an old or obvious composition cannot impart patentability to the claimed composition under § 103. *See In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

Accordingly, in the present case, the fact that Appellants may have discovered a new advantage for adding bread crumbs to the filling of a dough product does not result in the metamorphosis of an obvious food composition comprising bread crumbs into a different, nonobvious composition. Significantly, Appellants have not proffered any objective evidence which establishes unexpected results attributed to the addition of bread crumbs into the filling of the dough product of Hayes-Jacobson, let alone evidence of sufficient probative value to outweigh the obviousness of doing so. *See In re May*, 574 F.2d 1082, 1092, 197 USPQ 601, 609 (CCPA 1978); *In re Nolan*, 553 F.2d 1261, 1267, 193 USPQ 641, 645 (CCPA 1977).

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In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims 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

clj

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