

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

Paper No. 32

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES  
\_\_\_\_\_

Ex parte WALTER GRASSLER  
and MANFRED WILD  
\_\_\_\_\_

Appeal No. 1997-0376  
Application 08/199,104  
\_\_\_\_\_

HEARD: August 15, 2000  
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Before GARRIS, OWENS, and LIEBERMAN, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 18 through 25 which are all of the claims pending in the application.

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The subject matter on appeal relates to a mousse product containing pieces of sterilized chocolate comprised of, by weight, from 50% to 70% fats, from 30% to 50% cocoa powder and from 1% to 10% sugar. This appealed subject matter is adequately illustrated by representative independent claim 18 which reads as follows:

18. In a mousse product wherein a mousse contains pieces of chocolate dispersed therein, the improvements comprising the pieces of chocolate being sterilized pieces of chocolate comprised of, by weight, from 50% to 70% fats, from 30% to 50% cocoa powder and from 1% to 10% sugar and being contained in the mousse in an amount of between 2% and 10% by weight.

The prior art relied upon by the examiner is set forth below:

Kleinert 1973	3,769,030	Oct. 30,
Japanese Kokai 1984	59-196028	Nov. 7,

(referred to hereinafter as Japanese reference)

Appellants' own admission, specification, page 1.

All of the claims on appeal stand rejected under 35 U.S.C. § 103 as being unpatentable over the appellants' admission taken with Kleinert and the Japanese reference.<sup>1</sup>

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<sup>1</sup>On the record before us, particularly the footnote on page 5 of the appellants' communication filed April 17, 1995 (Paper No. 8), we consider the examiner's reliance upon the

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This rejection cannot be sustained.

According to the examiner, the here-claimed mousse product distinguishes over the admitted prior art mousse product via the claim requirement that the pieces of chocolate be sterilized and via the claim requirement that the pieces of chocolate be comprised of the ingredients and amounts recited in the appealed independent claims (see page 2 of the Answer and pages 3 through 5 of the Office Action mailed November 10, 1994 as Paper No. 6). It is the examiner's basic conclusion, however, that Kleinert and the Japanese reference would have suggested modifying the admitted prior art mousse product in such a manner as to result in a mousse product having these features. We do not agree.

As correctly pointed out by the appellants, Kleinert contains no teaching or suggestion of sterilizing chocolate of any kind much less chocolate of the type here claimed for use in a mousse product. Instead, Kleinert is directed to a process for making chocolate which avoids a conching

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Japanese reference as being limited to the English-language Abstract thereof. As a consequence, we likewise will limit our consideration of the Japanese reference to this Abstract in assessing the merits of the examiner's rejection.

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operation. While this process may include a heat sterilization step, this step is practiced upon an intermediate material (e.g., cocoa mass) rather than the ultimate product of chocolate.

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As for the Japanese reference, the examiner points to nothing and our independent study reveals nothing in the Abstract thereof which would have suggested modifying the admitted prior art mousse product in such a manner as to result in the here-claimed invention. More specifically, this Abstract contains nothing which would have suggested providing the prior art mousse product with sterilized pieces of chocolate comprised of the here-claimed ingredients and amounts. Stated somewhat differently, nothing in the Abstract would have suggested using the germ-free confectionary product described therein as pieces of chocolate in the prior art mousse described on page 1 of the appellants' specification.

Under these circumstances, it is our determination that the only basis for combining the applied prior art in the manner proposed by the examiner derives from impermissible hindsight. W.L. Gore & Assocs. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-313 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). For this reason, the rejection advanced by the examiner in this appeal cannot be sustained.

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The decision of the examiner is reversed.

REVERSED

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
TERRY J. OWENS	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
	)	
PAUL LIEBERMAN	)	
Administrative Patent Judge	)	

BRG:svt

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