

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 34

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte KARSTEN VIDKJAER

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Appeal No. 1999-2494  
Application No. 08/404,676

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ON BRIEF

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Before KIMLIN, DELMENDO, and POTEATE, Administrative Patent Judges.

POTEATE, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the examiner's refusal to allow claims 22-29, which are all of the claims pending in the application.

Claim 22 is representative of the subject matter on appeal and is reproduced below:

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22. The combination of dough product based on a low temperature inactive living yeast which generates gas over time, the dough product containing between 43 and 62% of flour, between 5 and 23% fat, between 0.01 and 1% of a low temperature inactive strain yeast that is essentially inactive at temperatures up to 8-12°C, between 1.0 and 2.5% of sodium chloride or sugar, and between 23 and 33% water, and a closed packaging system containing said dough product, said packaging system comprising a housing of a material which is essentially impervious to oxygen, valve means operatively associated with the housing for allowing exit of gas from the housing when the gas pressure exceeds a certain minimum value and which closes when said gas pressure drops below the minimum value to prevent entry of oxygen into the housing, and a substantially oxygen-free gaseous atmosphere surrounding the dough product and additional to any gases generated by said living yeast.

The references relied upon by the examiner are:

Lorber	1,904,741	Apr. 18, 1933
Richardson et al. (Richardson)	4,120,984	Oct. 17, 1978
Umina	4,590,078	May 20, 1986
Perry et al. (Perry)	5,547,694	Aug. 20, 1996
Errass	0 158 590	Oct. 16, 1985
Gysler et al. (Gysler)	EP 158590	Jun. 3, 1992
Domingues et al. (Domingues)	W0 93/01724	Feb. 4, 1993
Reizaburo	JP 5-130825	May 28, 1993

1. Claims 22, 23, 26 and 27 stand rejected under 35 U.S.C. § 103 as unpatentable over Perry in view of Domingues and further in view of Gysler and Errass.

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2. Claims 24 and 25 stand rejected under 35 U.S.C. § 103 as unpatentable over Perry in view of Domingues and further in view of Gysler, Errass and Richardson.

3. Claim 28 stands rejected under 35 U.S.C. § 103 as unpatentable over Perry in view of Domingues and further in view of Gysler, Errass and Reizaburo.

4. Claim 29 stands rejected under 35 U.S.C. § 103 as unpatentable over Perry in view of Domingues and further in view of Gysler, Errass, Lorber and Umina.

We reverse as to all four grounds of rejection.

#### Background

The invention relates to the combination of a dough product based on a low temperature inactive (LTI) leavened yeast and a closed packaging system containing the dough product. Claim 22; Appeal Brief, Paper No. 26, received December 11, 1998, page 2, paragraph 5. The packaging system comprises a housing which is essentially impervious to oxygen and valve means to allow exit of gas generated by the living yeast. Claim 22; specification, page 2, lines 4-10. According to appellant, the dough does not have to be proofed prior to storage. Specification, page 2, lines 27-

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28. Thus, the dough may be directly baked without a proofing step. *Id.*, lines 28-30.

#### Discussion

The initial burden of presenting a *prima facie* case of obviousness rest on the examiner. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). In order to establish a *prima facie* case of obviousness, the examiner must identify a suggestion or motivation to modify the teachings of the cited references to achieve the claimed invention. *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000). The suggestion or motivation to modify a reference may be implicit from the prior art as a whole rather than expressly stated. *Id.* However, regardless of whether the examiner relies on an express or implicit showing, he must provide reasons for finding a limitation to be taught or suggested in the references. *Id.*

The examiner found that Perry discloses the invention as claimed with the exception that Perry fails to teach some of the particulars of the dough composition. Examiner's Answer, Paper No. 27, mailed March 24, 1999, page 4. The examiner relies on

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Domingues as disclosing packaged dough compositions containing (LTI) yeast. *Id.*, page 5. The examiner relies on Gysler and Errass as further evidence that dough compositions containing (LTI) yeast are conventional. *Id.*, pages 5 and 6. According to the examiner, "[t]o modify Perry et al and substitute one conventional yeast containing dough composition for another conventional yeast containing dough composition is seen to have been obvious." *Id.*, page 5.

Appellant's principal argument is that the examiner has failed to establish the requisite suggestion, teaching or motivation to replace the dough product of Perry with an (LTI) yeast based dough product as disclosed in the secondary references. In particular, appellant points out that in Perry, the dough proofs in the container. Appeal Brief, page 8 (referencing column 11, lines 46-49 of Perry). While appellant concedes that Domingues disclose an (LTI) yeast based dough, they note that Domingues teaches proofing the dough composition before it is sealed in a container. Appeal Brief, page 8 (referencing page 4, lines 20-22 of Domingues). See Domingues, page 8, second full paragraph. With respect to Gysler, appellant points out that Gysler is directed to a process for preparing (LTI) yeast and that Gysler only prepared dough for testing purposes.

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According to appellant, Errass does not disclose dough containing (LTI) yeast and the only containers utilized for storing Errass' dough is air-tight transparent plastic films. *Id.*, page 10.

We are in agreement with appellant that the examiner has failed to establish why one of ordinary skill in the art would have been motivated to replace the dough in Perry's container, which is not proofed prior to sealing, with an (LTI) based dough product such as that of Domingues which is proofed prior to sealing it in the container. Rather, it appears that the examiner's proposed combination is based on improper hindsight reconstruction. *See W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984).

Accordingly, the rejection of claims 22, 23, 26 and 27 under 35 U.S.C. § 103 as unpatentable over Perry in view of Domingues and further in view of Gysler or Errass is reversed.

Having found that Richardson, Reizaburo, Lorber and Umina fail to remedy the deficiencies of the primary references for the reasons set forth in appellant's brief (see pages 12-15), we also reverse the rejections of claims 24, 25, 28 and 29, which depend from claim 22.

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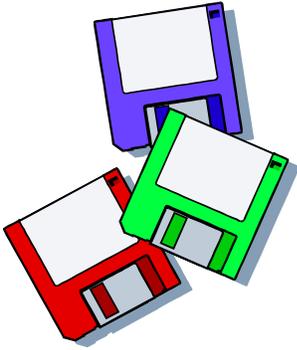
REVERSED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
ROMULO H. DELMENDO	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
LINDA R. POTEATE	)	
Administrative Patent Judge	)	

LRP/lbg

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DECISION: REVERSED

Prepared: June 18, 2004

Draft            Final

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