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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

Ex parte JOHN KIERAN BRODY, KIM M. DESMIDT, and
NANCY M. KRAHN

Appeal 2011-013691
Application 11/363,823
Technology Center 1700

Before CATHERINE Q. TIMM, BEVERLY A. FRANKLIN, and DEBORAH KATZ, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1-28. We have jurisdiction under 35 U.S.C. § 6.

STATEMENT OF THE CASE

Claim 1, 12, 24, and 27 are representative of the subject matter on appeal and are set forth below:

1. A smoked cheese product comprising:

a first sheet of interleaf material having a first surface and a second surface;

a first layer of a smoke flavoring component applied to the first surface of the sheet, the layer of smoke flavoring component having a thickness; and

a first slice of cheese having a first surface overlying and in direct contact with the layer of smoke flavoring on the first surface of the sheet, the slice of cheese also having a second surface,

wherein the sheet of interleaf material, the layer of smoke flavoring component and the slice of cheese are disposed within an enclosure.

12. A sliced, flavored cheese product comprising:

a plurality of slices of cheese forming a stack of cheese slices, each of the cheese slices in the stack of cheese slices having a first surface and a second surface;

a plurality of sheets of interleaf material, each of said sheets of interleaf material having a first surface coated with a flavoring component and a second surface, wherein the stack of cheese slices is arranged such that each of the cheese slices is separated from every other cheese slice by one of the plurality of sheets of interleaf material and wherein one of the first and second surfaces of each of the slices of cheese overlies and directly contacts the first surface of the one sheet of interleaf material; and wherein the stack of cheese slices is placed in a package.

24. A method of flavoring cheese to a specified flavor level, the method comprising:

providing a slice of cheese having a first surface, a second surface;

providing a sheet of interleaf material having a first and a second surface;

applying a layer of flavoring coating to one of the first and second surfaces of the interleaf material;

placing the first surface of the cheese slice in direct contact with the layer of flavoring coating applied to the one of the first and second surfaces of the interleaf material, wherein substantially the entire surface area of the first surface of the cheese slice is in direct contact with the layer of flavoring coating; and

storing the slice of cheese and flavored interleaf paper in an enclosure until the specified flavor level is achieved in the slice of cheese by the interaction between the layer of flavoring coating and the first surface of the cheese slice.

27. A method of producing a smoked cheese product, the method comprising:

providing a plurality of cheese slices, each of the cheese slices having a first surface and a second surface;

providing a plurality of sheets of interleaf material, each sheet having a first and a second surface;

coating at least one of the first and second surfaces of each sheet of interleaf material with a layer of smoke flavoring;

arranging the plurality of cheese slices and the plurality of coated sheets of interleaf paper in a stack, whereby each cheese slice in the stack is separated by at least one of the sheets of coated interleaf material; and

storing the stack in a sealed enclosure.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Burns	3,710,533	Jan. 16, 1973
Fessler	3,890,886	Jun. 24, 1975
Smith	4,442,868	Apr. 17, 1984
Dinh-Sybeldon	2003/0054075 A1	Mar. 20, 2003
Hollenbeck	3,330,669	Jul. 11, 1967
Eickerman, Sr.	3,150,982	Sep. 29, 1964
Bush	4,069,348	Jan. 17, 1978
Juhl	5,288,532	Feb. 22, 1994
Wallis	3,008,836	Nov. 14, 1961
Tindall	3,086,264	Apr. 23, 1963
Marnocha	5,582,853	Dec. 10, 1996
Thompson	5,924,795	Jul. 20, 1999

THE REJECTIONS

1. Claims 1, 2, 5-8, 11, 12, 15, 17-25, 27, and 28 are rejected under 35 U.S.C. §103 over Burns in view of Fessler, Smith, Dinh-Sybeldon, and Hollenbeck, and further in view of Eickerman and Bush.

2. Claim 9 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the references as applied to Claims 1, 2, 5-8, 11-12, 15, 17-25, 27, and 28 above, and in further view of Juhl.

3. Claims 3, 4, 13, and 14 are rejected under 35 U.S.C. §103 (a) as being unpatentable over the references as applied to Claims 1, 2, 5-8, 11-12, 15, 17-25, 27, and 28 above, and in further view of Wallis.

4. Claim 10 is rejected under 35 U.S.C. §103 (a) as being unpatentable over the references as applied to Claims 1, 2, 5-8, 11-12, 15, 17-25, 27, and 28 above, and in further view of Tindall , Marnocha, and Thompson.

5. Claims 16 and 26 are rejected under 35 U.S.C. §103 (a) as being unpatentable over the references as applied to Claims 1, 2, 5-8, 11-12, 15, 17-25, 27, and 28 above, and in further view of Marnocha and Tindall.

ANALYSIS

As an initial matter, Appellants have not presented separate arguments for all of the rejected claims. Rather, Appellants' arguments are principally directed to independent claim 1, 12, 24, and 27. Any claim not separately argued will stand or fall with its respective independent claim. *See* 37 C.F.R. § 41.37(c)(1)(vii).

We essentially adopt the Examiner's findings pertinent to the issues raised by Appellants. We therefore incorporate the Examiner's position as set forth in the Answer. We add the following for emphasis only.

On page 1 of the Reply Brief, Appellants focus their arguments by stating:

> As argued in the Appeal Brief, Eickerman is the lynchpin of the Examiner's rejection as it is the only reference that associates a flavorant with an interleaf material (Appeal Brief at 16-18). However, as pointed out, Eickerman describes two distinct embodiments, i.e., an envelope embodiment and a sheet embodiment. The flavorant is only associated with the envelope embodiment, not the sheet embodiment *(id.)*. Appellants argued that in order for the Examiner to arrive at the subject matter of any pending claim as a whole, it was necessary for the Examiner to improperly mix and match these two separate embodiments into a phantom third embodiment nowhere described or suggested in Eickerman.

We are not convinced by the above-described line of argument for the following reasons.

First, we note that "[c]ommon sense teaches … that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 at 420. Also, in an obviousness rejection, the combination of references must be considered as a whole, rather than the specific teaching of each reference. *In re Simon*, 461 F.2d 1387, 1390 (CCPA 1972); *In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971). *See also Boston Scientific Scimed, Inc. v. Cordis Corp.,* 554 F.3d 982, 991 (Fed. Cir. 2009), wherein combining two embodiments disclosed adjacent to each other in a prior art patent does not require a leap of inventiveness.

In the instant case, Appellants have not convinced us that the Examiner has not adequately applied prior art teachings as expressed in the

Answer in support of a prima facie case of obviousness. The applied art teaches concepts: (1) of packages of cheese slices having interleaf material (with no flavorings), separating cheese slices (Burns and Fessler); (2) of utilizing wrappings having flavorants next to cheese/food to import the flavorant to the cheese/food (Smith, Dinh-Sybeldon, and Hollenbeck); and (3) of interleaf material that, when in the form of an envelope, transfers flavorants to a food product (Fig. 2 of Eickerman) from both sides of the envelope, and when it is in the form of a sheet, the sheet contains dry particles of tenderizing proteolytic enzyme (Figure 6 of Eickerman) that transfers to the food product.

It appears that an aspect of Appellants' position is that because Eickerman's sheet does not include a smoke flavoring component, and does not have the flavorant on both sides of the cheese, that the applied art does not suggest their claimed subject matter. However, upon a fair reading of the applied art, taken as a whole, we agree with the Examiner that the applied art would have suggested to one or ordinary skill in the art, to have applied a flavorant (such a smoke flavoring or a desired flavoring) onto one or both sides of an interleaf that is in direct contact with cheese because the concept of introducing flavorant from one or both sides of material in direct contact with cheese/food product is taught, because interleafs have been used in between slices of cheese, and because interleafs, having an ingredient thereon, used to transfer that ingredient to a food product, is taught, as discussed above, and as explained by the Examiner throughout the Answer. The Examiner's position thus adequately reflects the legal principles discussed, supra, and Appellants' arguments do not convince us otherwise.

In view of the above, we affirm the rejection involving claims 1, 12, 24, and 27 (Rejection 1). Because Appellants do not offer additional arguments with regard to Rejections 2-5, we affirm these rejections also (Br. 23).

CONCLUSIONS OF LAW AND DECISION

Each rejection 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).

AFFIRMED

tc