



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 13/885,237 | 10/29/2013 | Andrea Cattaruzza | SLO0155 PCT US | 1783 |
| 10599 | 7590 | 03/07/2018 | EXAMINER | |
| Mars, Incorporated Lisa Becker 1132 W. Blackhawk Street Chicago, IL 60642 | | | TRAN, LIEN THUY | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 1793 | |
| | | | NOTIFICATION DATE | DELIVERY MODE |
| | | | 03/07/2018 | ELECTRONIC |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mars.patents@effem.com
lisa.becker1@effem.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANDREA CATTARUZZA, STEWART RADFORD,
and ALEJANDRO GREGORIO MARANGONI¹

Appeal 2017-004962
Application 13/885,237²
Technology Center 1700

Before JEFFREY T. SMITH, AVELYN M. ROSS,
and JANE E. INGLESE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from the Final Rejection of claims 1–7, 9–10, 12–14, 16 and 18–23.³ We have jurisdiction under 35 U.S.C. § 6.

¹ These are the names of the identified inventors of the appealed application.

² According to the Appeal Brief, the real party in interest is Mars Inc. *See* (App. Br. 2).

³ Claim 8 and 15 has been cancelled. (Advisory Act.).

Appellants' invention relates generally to cooked dough products exhibiting reduced oil migration, and to methods of making such products. (Spec. 1). Claim 1 illustrates the subject matter on appeal and is reproduced below from the Claims Appendix to the principal Brief.

1. A cooked dough product consisting essentially of flour, water, at least one of an oil component and a fat component, and ethyl cellulose.

Appellants (*see generally* App. Br.) request review of the following rejections:

- I. Claims 1–7 and 9 rejected under 35 U.S.C. § 102(b) as anticipated by Petrofsky (US 2006/0210673 A1, published Sep. 21, 2006).
- II. Claims 10, 12–14, 16, 18–23 rejected under 35 U.S.C. § 103(a) as unpatentable over Petrofsky.
- III. Claims 1–7, 9, 10, 12–14, 16 and 18–23 rejected under 35 U.S.C. § 103(a) as unpatentable over the combined teachings of Watts (US 2010/0303987 A1, published Dec. 2, 2010) and Davis (US 6,620,450 B1, issued Sep. 16, 2003).

OPINION

After consideration of Appellants' arguments and evidence and the Examiner's position in the Final Office Action and Answer, we AFFIRM the anticipation and obviousness determinations.

The complete statement of the rejections on appeal appear in the Final Office Action. (Final Act. 2–13).

*Rejections over Petrofsky*⁴

Upon consideration of the evidence in this appeal record in light of the respective positions advanced by the Examiner and Appellants, we determine that Appellants have not identified reversible error in the Examiner's rejections. We sustain rejections I and II for the reasons provided by the Examiner. We add the following:

The Examiner found Petrofsky disclose a cooked dough and a method of making the dough wherein the dough comprises ethylcellulose, water, flour, surfactant, and a hydrocolloid. (Final Act. 3–4).

Appellants argue the “consisting essentially of” language of independent claim 1 limits the scope of the claim to the specifically recited ingredients plus others that do not materially affect the basic and novel characteristics of the claimed invention. (App. Br. 11–13). Appellants specifically state:

⁴ Appellants' initial arguments are principally directed to independent claim 1. (App. Br. 9–16). Appellants also present arguments to other claims specifically. We limit our initial discussion to independent claim 1 which we select as representative of the rejected claims. We will also address the separately argued claims.

It is Appellant's position that including any amount of any of the fiber sources taught by Petrofsky would materially affect the basic and novel characteristics of the claimed dough product, in that any amount of such a fiber in the present dough products could be expected to impact the oil migration within the dough product as well as the amount of mono- and polyunsaturated fatty acids that could be used while yet still achieving the inventive objective of providing a dough product having a more healthful fatty acid composition with reduced oil migration and thus, a better taste than conventional dough products. The transitional phrase "consisting essentially of" thus excludes any amount of any of the fibers required by Petrofsky from the claimed dough product, and Petrofsky cannot be said to anticipate claim 1, or the claims dependent therefrom. (App. Br. 13).

On this record, including consideration of the arguments presented by Appellants, we are not persuaded that, in dough products, the fatty acid content and oil migration properties are the basic and novel characteristics of the claimed composition rather than merely being benefits provided by some compositions according to the invention. Appellants have not directed us to portions of the Specification that establish in dough products the fatty acid content and oil migration properties are the basic and novel characteristics of the invention. Appellants have not directed us to evidence that establishes the amount of fiber in the dough products impacts the oil migration within the dough product as well as the amount of mono- and polyunsaturated fatty acids present in the product. *In re Herz*, 537 F.2d 549, 551–52 (CCPA 1976). ("[I]t is necessary and proper to determine whether [the] specification reasonably supports a construction" that would exclude or include particular ingredients.); *See also PPG Indus. v. Guardian Indus. Corp.*, 156 F.3d 1351, 1354–357 (Fed. Cir. 1998) (Patentees "could have defined the scope of the phrase 'consisting essentially of' for purposes of its patent by making clear in its specification what it regarded as constituting a

material change in the basic and novel characteristics of the invention. The question for our decision is whether PPG did so.”). Appellants have not directed us to portions of the Specification which describe the effect on the basic and novel characteristics of dough products of including hydrocolloid, flour, water, and surfactant—as described by Petrofsky. Unsupported arguments of counsel cannot take the place of evidence. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997); *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984).

We adopt the Examiner’s reasoning when addressing Appellants’ arguments for claims 10, 12–14, 16, and 18–23. (Ans. 12–15). We add the following. Petrofsky discloses the dough compositions can be utilized in a variety of baked products. (Petrofsky ¶ 16). Appellants have not directed us to evidence that it was beyond the skill of a person having ordinary skill in the art to determine the appropriate amount of sugar to be utilized in various dough based products. A person of ordinary skill in the art would have sufficient skill to select the appropriate amount of sugar to achieve the desired sweetness in dough based products such as cookies. Petrofsky provides guidance to a person of ordinary skill in the art to select the amount of hydrocolloid present in the composition. (Petrofsky ¶ 8).

Rejection over the combination of Watts and Davis

The Examiner found the combination of Watts and Davis describes and suggests dough products and the method of making the dough products as required by the claimed invention. The complete statement of the rejections on appeal appear in the Final Office Action. (Final Act. 6–8).

Appellants argue the claimed language “consisting essentially of” excludes hydrophobin which is required by Watts. (App. Br. 18).

Appellants’ arguments regarding the consisting essentially of language are not persuasive for the reasons set forth above. Appellants have not directed us to evidence that establishes the amount of hydrophobin in the dough products impact the oil migration within the dough product as well as the amount of mono- and polyunsaturated fatty acids present in the product.

We adopt the Examiner’s reasoning when addressing Appellants’ arguments for claims 13, 14, 16, 18, 19 and 23. (Ans. 17–20). We add the following.

Appellants argue the Examiner has resorted to hindsight to determine the amount of ethylcellulose to be included in the dough product. (App. Br. 20). Appellants have not disputed the Examiner’s determination that the combination of Watts and Davis would have suggested forming a dough product comprising 0.5% ethylcellulose and 2% fat. The fact that Appellants have described a different technique for determining the content of components does not in and of itself create a patentable distinction. A person of ordinary skill in the art following the teachings of Watts and Davis would have performed a process forming a dough product comprising 0.5% ethylcellulose and 2% fat—which results in composition comprising 20% ethylcellulose—and in so doing, would have been practicing the claimed invention. *Mehl/Biophile Int’l Corp. v. Milgraum*, 192 F.3d 1362, 1366 (Fed. Cir. 1999) (“Where, as here, the result is a necessary consequence of what was deliberately intended, it is of no import that the article’s authors did not appreciate the results.”).

Appeal 2017-004962
Application 13/885,237

For the reasons stated above, and the reasons presented by the Examiner, we sustain the appealed rejections.

ORDER

The rejection of claims 1–7 and 9 under 35 U.S.C. § 102(b) as anticipated by Petrofsky is affirmed.

The rejection of claims 10, 12–14, 16, 18–23 under 35 U.S.C. § 103(a) over Petrofsky is affirmed.

The rejection of claims 1–7, 9, 10, 12–14, 16 and 18–23 under 35 U.S.C. § 103(a) Watts and Davis 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.

AFFIRMED