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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* FRANCESCA SANGIACOMO

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Appeal 2018-000548  
Application 14/358,384  
Technology Center 1700

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Before ROMULO H. DELMENDO, CHRISTOPHER C. KENNEDY, and  
LILAN REN, *Administrative Patent Judges*.

REN, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The record on appeal includes the Specification of May 15, 2014 (“Spec.”), the Examiner’s Final Action of December 2, 2016 (“Final Act.”), Appeal Brief of May 30, 2017 (“Br.”), the Examiner’s Answer of August 21, 2017 (“Ans.”), and Reply Brief of October 21, 2017 (“Reply Br.”).

### STATEMENT OF THE CASE

Appellant<sup>2</sup> appeals under 35 U.S.C. § 134 from a rejection of claims 1, 2, 4–9, 18, and 19. We have jurisdiction under 35 U.S.C. § 6(b). A hearing was held on July 25, 2019.

We affirm.

### CLAIMED SUBJECT MATTER

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A food (1) comprising one popcorn grain (2) substantially entire and included, completely or partially, in at least a first layer (3) of a first melted cheese directly in contact with the popcorn grain (2);  
wherein:
  - a) said first melted cheese has an initial moisture content of less than 35% prior to being melted, and
  - b) said first melted cheese is also cooked and its moisture after cooking is lower than 8%, and wherein the food is free of added fat.

Claims Appendix (Br. 9).

### REFERENCE<sup>3</sup>

The prior art reference relied upon by the Examiner in rejecting the claims on appeal is known as “Singley” which is a printout provided by the

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<sup>2</sup> “SAN LUCIO S.R.L.” is the Applicant. Application Data Sheet filed May 15, 2014. “SLB S.R.L. Via Vincenzo Civerchio, 8 Brescia, Italy” is identified in the Appeal Brief as the real party in interest. Br. 3.

<sup>3</sup> A reference known as Plochman is also relied upon for the rejection of dependent claim 9. Appellant does not argue separately for the rejection of claim 9. *See* Br. 4–8. We accordingly do not address separately the rejection of claim 9. *See* 37 C.F.R. § 41.37(c)(1)(iv).

“Wayback Machine” from the web address of <http://www.thekitchn.com>.

Final Act. 2. The Examiner finds that Singley’s publication date is May 11, 2011. *Id.*

The record before us includes two copies of Singley. In the Office Action of June 3, 2016, the Examiner provided a three-page copy of Singley (“Singley without comments”) with a date of “05.11.11” on the last page. The Examiner, along with the Examiner’s Answer, provided a ten-page copy of Singley (“Singley with comments”) with comments and a different page layout. Both copies are titled “Snack Recipe: Cheesy Spicy Popcorn” and written by “the Cheesemonger.” Appellant does not argue that the content or the substance of the two copies of Singley differs in any way<sup>4</sup> and for the

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<sup>4</sup> JUDGE KENNEDY: Counsel, are you just -- are you making a technical argument about the specific piece of evidence that was used in the office action as opposed to the new evidence that was attached to the answer? In other words, would you be making the same argument that you’re making now if the Examiner had simply attached what he attached to the answer if he had used that in the office action instead?

MR. SNYDER: Yeah, I think that’s a -- Your Honor, that’s an excellent question as to where this puts essentially the argument and I believe because these don’t have the same -- because these documents that are now being looked at don’t have what appears to be the same printing on them and I’m trying to match it up on the fly right here. I beg your pardon.

JUDGE DELMENDO: Well, if you felt that there was prejudice and that the evidence has changed, the proper remedy or course of action you should’ve taken is to file a petition to have the Examiner designate that as a new ground of rejection. Did you make any such petition?

MR. SNYDER: No. We did not, Your Honor, and I don’t think it would change actually the Examiner’s position or our position but to answer Your Honor’s question, I’m sorry to get off track, I think it is the same argument.

purpose of this opinion, we refer to the two copies collectively as the reference known as Singley – unless we specifically refer to “Singley with comments” or “Singley without comments.”

### REJECTIONS

Claims 1, 2, 4–8, 18 and 19 are rejected under pre-AIA 35 U.S.C. 103(a) as being unpatentable over Singley. Final Act. 2. Claim 9 is rejected under 35 U.S.C. § 103(a) as unpatentable over Singley in view of Plochman, *id.* at 5–6, but, as we stated above, was not separately argued.

### OPINION

The sole issue on appeal is the publication date of Singley. *See* Br. 3, 4. Although Appellant acknowledges that Singley has “the May 11, 2011 date printed on the reference,” Appellant argues that Singley is not prior art as the Examiner “failed to properly establish the publication date of Singley.” *Id.* at 5.<sup>5</sup> Appellant argues that the May 11, 2011 date printed on Singley “is unproven hearsay with no independent corroboration.” *Id.* at 6.

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Transcript for Oral Hearing for Appeal No. 2018-000548 (July 25, 2019), 10:3–24.

<sup>5</sup> For the first time on appeal, Appellant raises in the Reply Brief the argument that Singley does not teach or suggest certain claim limitations. Reply Br. 5–6. We decline to reach this argument absent a showing of good cause as to why it could not have been raised in the opening brief. *See Ex parte Nakashima*, 93 USPQ2d 1834 (BPAI 2010) (informative) (explaining that arguments and evidence not timely presented in the opening Brief will not be considered when filed in a Reply Brief, absent a showing of good cause explaining why the argument could not have been presented in the opening brief); *Ex parte Borden*, 93 USPQ2d 1473, 1477 (BPAI 2010) (informative) (“Properly interpreted, the Rules do not require the Board to

The Examiner, however, finds that Singley “includes comments that begin on the publication date of the disclosure, 11 May 2011” evidencing the publication date of Singley. Ans. 8. Singley indeed shows multiple comments each of which is accompanied by a name (e.g., “Rosebud”) and a “POSTED BY” date of “05.11.11.” Singley with comments, 5 (section titled “Comments (13)”)<sup>6</sup> This finding is consistent with the evidence and Appellant does not dispute that Singley includes these comments with the “POSTED BY” dates of May 11, 2011. *See e.g.*, Reply Br. 2–4.<sup>7</sup> No reversible error has therefore been identified in the Examiner’s finding of the May 11, 2011 publication date of Singley which we accept as fact. *See In re Kunzmann*, 326 F.2d 424, 425 n.3 (CCPA 1964).

Appellant additionally presents certain “extrinsic evidence” showing that when Appellant used the Wayback machine to retrieve Singley, “the earliest cached page for the Singley webpage cited by the examiner is February 27, 2012.” Br. 7. We are not persuaded by this argument because Appellant does not explain why the cached date supports the speculation that the earlier publication date is incorrect – or that the earlier publication date is unreliable. As the Examiner points out, “Appellant’s noting the frequency with which the main page of [www.thekitchn.com](http://www.thekitchn.com) was cached is not relevant to show how much less frequently the subpages on this webpage were

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take up a belated argument that has not been addressed by the Examiner, absent a showing of good cause.”). 37 C.F.R. § 41.41(b)(2).

<sup>6</sup> Singley is not paginated and we therefore provide our own.

<sup>7</sup> During hearing, counsel for Appellant argued that “I don’t think the issue is when they were commenting on it” but one of “issue of proof and reliability.” Transcript for Oral Hearing for Appeal No. 2018-000548 (July 25, 2019), 7:8–10.

cached compared to the main page.” Ans. 8. We further note that the record does not show how Appellant used the Wayback machine and whether Appellant’s method of use differs from that of the Examiner. In any event, Appellant is not asserting that the Examiner incorrectly used the Wayback machine to retrieve Singley.<sup>8</sup>

We review the appealed rejections for error based upon the issues identified by Appellants and in light of the arguments and evidence produced thereon. *Cf. Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”)). The Examiner, as the fact finder, finds that the evidence supports a publication date of May 11, 2011 for Singley.<sup>9</sup> Appellant’s argument on appeal does not identify error in

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<sup>8</sup> JUDGE REN: Counsel, in this case, are you -- I don’t think you’re saying it, but I just wanted to make sure. You’re not saying that the Examiner incorrectly somehow the method in which the Examiner used the Wayback machine is incorrect? That the Examiner didn’t know how to use the Wayback machine as a tool.

MR. SNYDER: That is absolutely true and by the way, I just want to make clear, there’s no indication that the original document that was cited in the June 3, 2016 office action came from the Wayback machine.

Transcript for Oral Hearing for Appeal No. 2018-000548 (July 25, 2019), 12:4–13.

<sup>9</sup> JUDGE DELMENDO: Okay. So the critical date -- there’s no dispute as to the critical date as November 22, 2011?

MR. SNYDER: That is correct. No dispute as to that date.  
Transcript for Oral Hearing for Appeal No. 2018-000548 (July 25, 2019), 4:17–19.

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the Examiner's evaluation of the evidence and we accordingly sustain the rejection.

DECISION

The Examiner's decision 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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED