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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RALPH A. STENVIK

Appeal 2018-002260
Application 14/575,686
Technology Center 1700

Before MICHAEL P. COLAIANNI, GEORGE C. BEST, and N. WHITNEY WILSON, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant[1] appeals under 35 U.S.C. § 134 the final rejections of claims 1–8 and 24–35. Appellant canceled claims 9–23. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

Appellant's invention is directed to the manufacture of a snack food product, which includes a primary, non-flowable filling and a secondary

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[1] Appellant identifies General Mills, Inc. as the real party in interest (Appeal Br. 4).

flowable filling (Spec. ¶ 1). The Specification describes that the primary and secondary food fillings are co-extruded upon a base or crust (*id.*). The Specification further describes that in one embodiment, the primary filling material is cheesecake, while the secondary filling material is fruit (*id.* at 4).

Claims 1 and 31 are illustrative (emphasis added):

1. A method of making snack bars comprising:

extruding a primary filling, constituted by a non-flowable material, onto a base;

co-extruding a secondary filling with the primary filling, wherein the secondary filling is pushed into the primary filling as to be embedded in, yet externally exposed from, the primary filling; and

cutting the primary filling, secondary filling and base into individual snack bars.

31. A method of making snack bars comprising:

supplying a primary filling, constituted by a non-flowable material, onto a base;

embedding a secondary filling into the primary filling, by pushing the secondary filling into the primary filling, while maintaining the secondary filling externally exposed from the primary filling; and

cutting the primary filling, secondary filling and base to form individual snack bars.

Appellant appeals the following rejections:[2]

1. Claims 1 and 28–33 are rejected under 35 U.S.C. § 103 as unpatentable over Rapaport (US 2001/0002267 A1; published May

[2] The Examiner rejected claim 31 under 35 U.S.C. § 102(a)(1) in the Final Office Action, mailed Dec. 15, 2016 ("Final Act.") 3. Appellant filed an Amendment After Final Rejection April 5, 2017. The Examiner entered the Amendment and withdrew the anticipation rejection in the Advisory Action,

31, 2001), in view of Murray et al. (US 2003/0129281 A1; published July 10, 2003, "Murray") (Ans. 3–9).

2. Claims 2–8 and 24–26 are rejected under 35 U.S.C. § 103 as unpatentable over Rapaport and Murray, in view of Thomas et al. (US 2004/0258820 A1; published Dec. 23, 2004, "Thomas"), as evidenced by Weinstein et al. (US 2010/0055274 A1; published Mar. 4, 2010, "Weinstein") (Ans. 9–15).

3. Claim 27 is rejected under 35 U.S.C. § 103 as unpatentable over Rapaport and Murray, in view of Thomas, as evidenced by Weinstein, in view of Fornaguera (US 7,771,182 B2; issued Aug. 10, 2010) (Ans. 15–16).

4. Claims 34 and 35 are rejected under 35 U.S.C. § 103 as unpatentable over Rapaport and Murray, in view of Thomas (Ans. 16–17).

FINDINGS OF FACT & ANALYSIS

REJECTION (I):

The Examiner's findings and conclusions regarding Rapaport and Murray are located on pages 3–9 of the Answer.

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mailed May 1, 2017 ("Adv. Act.") 2). The Examiner also revised the grounds for finally rejecting claims 1 and 31 (*id.*; *see generally* Ans. 1–17).

Claims 1 and 31

Rapaport's Figure 2B, which illustrates a cheesecake bar having a fruit flavoring component, is reproduced below.

Figure 2B

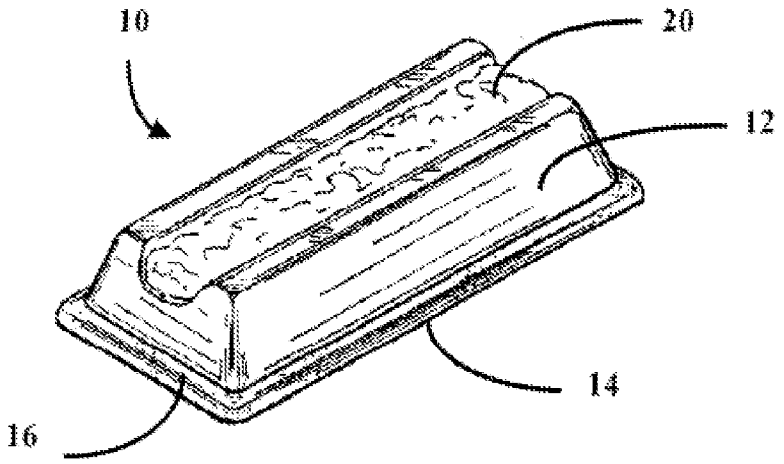

Figure 2B illustrates features of cheesecake bar **10**, which includes crust **14**, cheesecake filling **12**, and groove or depression **20** filled with fruit.

Murray's Figure 2K, which illustrates a product bar design for a cheese product, is reproduced below.

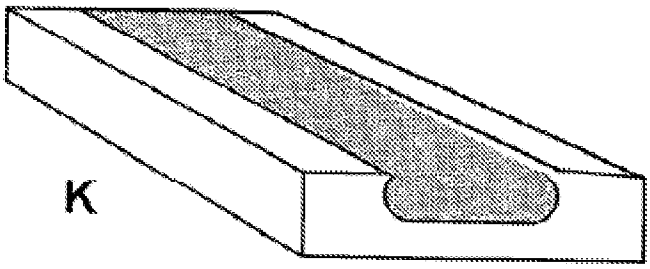

Figure 2 (continued)

Figure 2K, illustrates features of the cheese product bar having two phases in which: (i) the non-shaded phase is preferably cheese; and (ii) the shaded phase is preferably a second edible phase, such as fruit.

The Examiner finds that Rapaport teaches or suggests each step in the method for making snack bars recited in independent claims 1 and 31, but Rapaport does not disclose either: (i) "co-extruding a secondary filling with the primary filling, wherein the secondary filling is pushed into the primaryfilling as to be embedded in:" or (ii) "embedding a secondary filling into the primary filling, by pushing the secondary filling into the primary filling," as recited in each respective claim (Ans. 3–4, 5–6; *see also* App. Br. 5, 23 (Claims App.)). The Examiner, however, finds that Murray teaches a method of making cheese products by co-extruding two or more phases, wherein at least one phase is cream cheese and the other phase is a fruit filling (*id.* at 4, 6).

The Examiner determines that it would have been obvious to one of ordinary skill in the art to use Murray's co-extrusion of an outer cream cheese phase and a secondary fruit filling phase to obtain Rapaport's snack bar, wherein the fruit filling is embedded within the cheesecake filling (*id.* at 4–5, and 7). The Examiner further determines that

> [o]ne of ordinary skill in the art would have been motivated to use [Murray's] co-extrusion method . . . to obtain [Rapaport's] snack bar[], because [Murray's] co-extrusion method . . . was already found to be a suitable method for embedding a secondary fruit filling in an outer cream cheese filling [to] thus obtain[] a hand-held bar wherein the secondary fruit filling is embedded yet externally exposed at the time of filing.

(Ans. 5, 7). Given that Rapaport's Figure 2B and Murray's Figure 2K, both "display bars wherein the secondary filling fits securely within the primary filling," the Examiner concludes that "one of ordinary skill in the art would have expected the secondary or inner filling to be pushed into the primary or outer filling through the process of co[-]extrusion" (*id.*).

Appellant argues that Murray does not teach that the secondary filling is pushed into the primary filling merely because Murray discloses co-extrusion (Appeal Br. 9, 14). According to Appellant, "the fillings of Murray or Rapport are merely placed alongside each other" without any pushing (Reply Br. 4).

Appellant's arguments are not persuasive.

There is no dispute that the pushing of the secondary filling into the primary filling within the meaning of claims 1 and 31 requires pressure, which, in turn, requires application of a force (Ans. 21; *see also* Appeal Br. 9, 13). As the Examiner finds, "Murray states that the extruded products are prepared using a low to moderate shear extruder, which operates *under pressure*" (Ans. 21 (citing Murray ¶ 31)). Furthermore, Appellant does not direct our attention to any evidence that Murray's co-extruded fillings are "merely placed alongside each other" without any pressure from the shaded phase onto the non-shaded phase (*see* Reply Br. 4). Thus, we agree with the Examiner that Murray necessarily teaches pushing "[b]ecause Murray teaches a co-extrusion process with the requisite pressure and force" (Ans. 21 (the product of such co-extrusion pressure in Murray Fig. 2K)). Therefore, Appellant's arguments have not identified reversible error in the Examiner's determination that one of ordinary skill in the art would have expected the secondary filling to be pushed into the primary filling through the process of co-extrusion.

Appellant argues that "in claiming the secondary filling is pushed into the primary filling, it is required that the secondary filling be forced into the primary filling in becoming embedded therein" (Appeal Br. 9). To support this position, Appellant directs our attention to a dictionary definition for

"'embed' which is understood as [to] 'fix (an object) firmly and deeply in a surrounding mass'" (Appeal Br. 8 (citation omitted)).

On the other hand, the Examiner determines that, in the absence of a definition in the Specification for the claim term "embedded" or "embed," the ordinary skilled artisan could reasonably understand these words to have meanings that do not require Appellant's asserted force or firmness (*see* Ans. 19 (Listing the following dictionary definitions: (i) "existing or firmly attached within something or under a surface;" (ii) "fixed into the surface of something;" and (iii) "fix or set securely or deeply.") (citations omitted).

The present appeal thus requires our interpretation of the language of claims 1 and 31, particularly our construction of the terms "embedded" and "embedding," respectively.

During prosecution, the PTO gives the language of the proposed claims "the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the [A]pplicant's [S]pecification." *In re Morris*, 127 F.3d 1048, 1054–55 (Fed. Cir. 1997).

In the absence of definitions in the Specification for the disputed terms' meanings , the Examiner's interpretation based upon the plain meaning of "embedded" as existing, fixed, or secured deep or within something is reasonable (*see* Ans. 19).

Appellant asserts, however, that the claims should be read in a manner consistent with the Specification, which describes that a greater extrusion pressure is required to embed the secondary filling into the non-flowable primary filling (Appeal Br. 9–10 (citing Spec. ¶ 21, Fig. 5); *see also* Appeal

Br. 14). Appellant argues that the Specification highlights the importance of "the positioning of an extrusion nozzle for the secondary filling material relative to an extrusion port for the primary filling material, as well as . . . the balancing of the relative flow pressures for the filling materials, to cause the embedding" (Appeal Br. 10, 15). According to Appellant, the Specification describes "'embedded in' or 'embedding' as involving the secondary filling being pushed into the primary filling such that the primary filling changes shape to surround and fix the secondary filling firmly in the primary filling" (Reply Br. 3).

Appellant's arguments are not persuasive.

We agree with the Examiner that Appellant's arguments regarding specific pressure force values and pressure differentials are not commensurate in scope with claims 1 and 31 (Ans. 23). Furthermore, these claims are silent with respect to any limitations regarding the arrangement of the extrusion port and nozzle. In other words, we construe these claims as not requiring either the described pressure differential, a balancing of the relative flow pressures for the filling materials, or the extrusion port and nozzle arrangement in order to embed the secondary filling into the primary filling. During prosecution before the PTO, claims are to be given their broadest reasonable interpretation, and the scope of a claim cannot be narrowed by reading limitations into the claim. *See Morris*, 111 F.3d at 1054; *see also In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989); and *In re Prater*, 415 F.2d 1393, 1404–05 (CCPA 1969). Therefore, we conclude that the term "embedded" and "embedding" as recited in claims 1 and 31, respectively, encompasses Murray's disclosed fixing and securing of a

secondary fruit filling deeply within an outer cream cheese filling (*see* Murray Figure 2K).

Claim 32

Claim 32 recites the following limitations (emphasis added):

> 32. The method of claim 31, *wherein the primary filling is supplied onto the base so as to have a smooth top surface*, and *the secondary filling is embedded in the primary filling so as to be substantially flush with and visible from the top surface.*

Appellant argues "that the primary filling of Rapaport does not have a smooth top surface but rather a significantly undulated top surface" (Appeal Br. 17). Appellant further argues that Rapaport's groove **20** is pre-formed and the Examiner's proposed modification would have only produced a method wherein the secondary filling is co-extruded to fill the pre-formed groove of Murray (*id.*). Appellant concludes that "there would [have] be[en] no pushing of the secondary filling into the primary filling so as to cause embedding of the secondary filling into a smooth top surface of the primary filling as required to meet the limitations of claims 32" (*id.*).

We are not persuaded by these arguments.

As the Examiner finds, Rapaport explicitly discloses that those skilled in the art will realize that other configurations or shapes for the cheesecake products can be used as well (Ans. 27 (citing Rapaport ¶ 24)). We agree with the Examiner that Murray would have suggested a co-extrusion method for obtaining a cream cheese or cheesecake bar with a secondary fruit filling embedded therein, obviating the need to pre-form a groove as taught by Rapaport (Ans. 27). Furthermore, Murray's Figure 2K depicts a smooth top surface for the primary filling, which would have resulted from the co-

extrusion of the two distinct phases used to modify Rapaport. For the reasons set forth above, the broadest reasonable construction of the terms "embedded" and "embedding," as recited in claims 1 and 31, respectively, encompasses Murray's fixing and securing of a secondary fruit filling deeply within an outer cream cheese filling. Lastly, Murray's Figure 2K depicts that the secondary filling is substantially flush with and visible from the top surface.[3]

Claim 33

Claim 33 recites the following limitations (emphasis added):

> 33. The method of claim 32, *wherein the primary filling is supplied by being extruded to a depth* and the secondary filling is embedded into the primary filling by being co-extruded while being pushed into the primary filling.

Appellant argues "that the primary filling of Rapaport requires a range of depths due to the inclusion of the groove" (Appeal Br. 17). Appellant further argues the Examiner's determination that "one of ordinary skill in the art at the time of filling [*sic*, filing] would have found extrusion to a depth to have been obvious" is unsupported by reasoning or evidence (*id.*; *see* Ans. 8).

We are not persuaded by these arguments.

As the Examiner finds, "Rapaport and Murray show a secondary filling within a primary filling extending below or beneath the surface"

[3] Appellant argues that claim 32 requires that, in order for the secondary filling "to be substantially flush with a smooth top surface, the secondary filling would have to be substantially smooth" (Reply Br. 5). Even assuming that Appellant's claim construction is correct, the shaded phase depicted in Murray's Figure 2K appears to be similarly substantially smooth.

within the meaning of the broad limitation "to a depth" (Ans. 28 (Rapaport, Fig. 2B; Murray, Fig. 2K)). Appellant's arguments fail to identify reversible error in the Examiner's reasoning it would have obvious to the ordinary skilled artisan "that extrusion to a depth as well as adjusting the co-extruded secondary filling . . . [is] based on how much of this particular filling is desired for use in the primary filling and also the snack bar" (Ans. 28).

On this record, we find that Appellant's arguments have not identified reversible error in the Examiner's combination of Rapaport and Murray to render claims 1 and 28–33 obvious. Accordingly, we affirm this rejection of claims 1 and 28–33 for the reasons set forth above, in the Advisory Action, and in the Answer. 37 C.F.R. § 41.37(c)(1)(iv).

REJECTION (II):

The Examiner's findings and conclusions regarding Rapaport, Murray, and Thomas, as evidenced by Weinstein are located on pages 9–15 of the Answer.

For the presently appealed claims 2, 5, 24, and 25, Appellant relies on arguments for reversal of Rejection (I) of claim 1 (Appeal Br. 18). Appellant separately argues for reversal of Rejection (II) of claims 3, 4, 6, and 26 (Appeal Br. 18–21; *see also* Reply Br. 5). Appellant's arguments for reversal of this rejection of claims 3 and 4 are substantially similar to the arguments made for reversal of Rejection (I) of claims 32 and 33, respectively (*compare* Appeal Br. 16–18 to 18–20).[4]

[4] We note that Murray's Fig. 2K shows that the primary filling is extruded to approximately half the depth of the secondary filling (*see* claim 4).

Claims 6–8 and 26

Claim 6 and 26 recite the following limitations (emphasis added):

> 6. The method of claim 5, *further comprising: oscillating the extrusion nozzle during extruding of the primary and secondary fillings to produce the repeating pattern.*
>
> 26. The method of claim 32, *further comprising: oscillating the extrusion nozzle relative to the extrusion port.*

Regarding claims 6 and 26, Appellant argues that "there is no reason to oscillate extruders in making the product of Rapaport" (Appeal Br. 20). With regard to claim 26, Appellant further argues "that the Rapaport product with a secondary filling filled groove could not be made with an extrusion nozzle for the secondary filling [that] is oscillated relative to an extrusion port for the primary filling" (*id.* at 20–21).

Appellant's arguments are not persuasive because each attacks Rapaport individually instead of addressing what the combined teachings of the prior art would have suggested to the ordinarily skilled artisan. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). The Examiner finds that Thomas would have suggested oscillating an extrusion nozzle during the extrusion of fillings to produce a repeating pattern that is non-linear (Ans. 13). In other words, the Examiner further modifies Rapaport's and Murray's co-extrusion method of making a cheesecake bar having a fruit flavoring to use Thomas's oscillating extrusion nozzle during the co-extrusion of fillings (*id.*). Although Appellant argues that Rapaport does not teach the limitations recited in claims 6 and 26, Appellant's arguments do not address this combination of the prior art or specifically contest the Examiner's findings regarding Thomas (*see* Appeal Br. 20–21).

On this record, we find that Appellant's arguments have not identified reversible error in the Examiner's combination of Rapaport, Murray and Thomas, as evidenced by Weinstein to render claims 2–8 and 24–26 obvious. Accordingly, we affirm this rejection of claims 2–8 and 24–26 for the reasons set forth above, in the Advisory Action, and in the Answer. 37 C.F.R. § 41.37(c)(1)(iv).

REJECTION (III):

The Examiner's findings and conclusions regarding Rapaport, Murray, and Thomas, as evidenced by Weinstein, and Fornaguera are located on pages 15–16 of the Answer.

For the presently appealed claim 27, Appellant relies on arguments for reversal of Rejection (II) of claim 26 (Appeal Br. 21). Accordingly, we affirm this rejection of claim 27 for the reasons set forth above, in the Advisory Action, and in the Answer. 37 C.F.R. § 41.37(c)(1)(iv).

REJECTION (IV):

The Examiner's findings and conclusions regarding Rapaport, Murray, and Thomas, as are located on pages 16–17 of the Answer.

For the presently appealed claims 34 and 35, Appellant only argues for reversal of this rejection of claim 34 (Appeal Br. 21; *see also* Reply Br. 6).

Claim 34

Claim 34 recites the following limitations (emphasis added):

> 34. The method of claim 31, *wherein the secondary filling is embedded in the primary filling in a repeating, non-linear pattern.*

Appellant argues that because Rapaport fails to disclose a non-linear pattern for either the groove or the primary filling, the ordinary skilled artisan could not have made a non-linear patterned groove that is filled by the secondary filling (Appeal Br. 21).

Appellant's arguments are not persuasive because they attack Rappaport individually instead of addressing what the combined teachings of the prior art would have suggested to the ordinarily skilled artisan. *In re Keller*, 642 F.2d at 425. The Examiner finds that Thomas would have suggested including a repeating, non-linear pattern at the top of a decorated dessert (Ans. 16–17). In other words, the Examiner further modifies Rapaport's and Murray's co-extrusion method of making a cheesecake bar having a fruit flavoring to use Thomas's method of decorating dessert products (*id.*). Although Appellant argues that Rapaport does not teach the limitations recited in claim 34, Appellant's arguments do not address this combination of the prior art or specifically contest the Examiner's findings regarding Thomas (*see* Appeal Br. 21).

On this record, we find that Appellant's arguments have not identified reversible error in the Examiner's combination of Rapaport, Murray, and Thomas to render claims 34 and 35 obvious. Accordingly, we affirm this rejection of claims 34 and 35 for the reasons set forth above, in the Advisory Action, and in the Answer. 37 C.F.R. § 41.37(c)(1)(iv).

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)(1)(iv).

AFFIRMED