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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte TIMOTHY A. STUBBS, KENT M. BEARSON, PAUL H. BERNTHAL, DEIJING FU, JOHN DOW HARRIS JR., KRISTINA J. PHIPPS, BARBARA K. SCHMITT, and GLENN WILLE

Appeal 2019-001996
Application 14/229,439
Technology Center 1700

BEFORE BEVERLY A. FRANKLIN, JEFFREY B. ROBERTSON, and LILAN REN, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON APPEAL¹

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner's decision to reject claims 27 and 29–32.³ Appeal Br. 12. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm in part.

CLAIMED SUBJECT MATTER

Appellant states the invention relates to systems and methods for providing for adding functional additives such as smoke and/or color additives to a food product and/or food product casing in-line during a stuffing process for the food product. Spec. ¶ 2. Claim 30, reproduced below, is illustrative of the claimed subject matter (Appeal Br., Claims Appendix 35):

30.A method of making a food product, the method comprising:
 providing a casing material;
 extruding a food component such that the food component is received within the casing material; and

¹ This Decision includes citations to the following documents: Specification filed March 28, 2014 (“Spec.”); Final Office Action mailed October 17, 2017 (“Final Act.”); Advisory Action mailed June 12, 2018 (“Adv. Action”); Appeal Brief filed June 25, 2018 (“Appeal Br.”); Examiner's Answer mailed October 23, 2018 (“Ans.”); and Reply Brief filed December 21, 2018 (“Reply Br.”).

² We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as The Hillshire Brands Company. Appeal Br. 2.

³ Claims 1–26, 28, and 33 have been canceled. *See* Adv. Action, Continuation of 12; 15.

applying an additive to a surface of the casing material in an in-line manner as the food component is being received within the casing material;

wherein at least a portion of the additive is transferred from the casing material to the food component after the food component is received within the casing material and the portion is absorbed into and consumable with the food component;

wherein the step of applying the additive to the surface of the casing material in an in-line manner as the food component is being received within the casing material comprises:

applying the additive to a first portion of the surface of the casing material as the food component is being received in a second portion of the casing material;

the first portion of the casing material being attached to the second portion of the casing material.

Claims 27, 29, and 32 are also independent and recite method making food products. *Id.* at 34–36.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Bolin et al. hereinafter “Bolin”	US 4,382,098	May 3, 1983
Townsend	US 5,238,442	August 24, 1993
Jon et al. hereinafter “Jon”	US 5,955,126	September 21, 1999

REJECTIONS

1. The Examiner rejected claims 31 and 32 under 35 U.S.C. § 112(b) or 35 U.S.C. § 112, second paragraph as indefinite. Ans. 3–4.

2. The Examiner rejected claims 30 and 31 under pre-AIA 35 U.S.C. § 102(b) as anticipated by Townsend. Ans. 4–5.
3. The Examiner rejected claims 27 and 29 under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Townsend. Ans. 6–8.
4. The Examiner rejected claims 27 and 29–32 under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Jon and Bolin. Ans. 8–11.

OPINION

Rejection 1

The Examiner's Rejection

The Examiner determined that claim 31 is indefinite, because claim 31 recites “the first portion of the surface of the casing material receives the food component” and claim 30, from which claim 31 depends, recites the food component is being received in a second portion of the casing material as opposed to the first portion of the surface of the casing material. Ans. 3–4. The Examiner further explained that it is unclear how the first portion of the surface of the casing material would receive the food component as recited in claim 31, when claim 30 recites the additive is applied to the first portion of the surface of the casing material. *Id.* at 24.

The Examiner determined claim 32 is indefinite because it recites “processing a surface of casing material prior to applying the additive to the surface of the casing material” and also “wherein the processing of the surface of the casing material occurs simultaneous with the extruding and the additive applying steps.” *Id.* at 4.

Appellant's Contentions

Appellant argues claim 31 is not indefinite, because a method claim can include a scenario at different points in time, where the casing material first portion receives additive and the casing material second portion receives a section of the food component, and the casing material first portion that is now coated with additive, receives another section of the food component. Appeal Br. 31–32; Reply Br. 34–35. Appellant contends that had the Examiner identified the issue with respect to a “first portion of the surface” and a “first portion” earlier, Appellant would have amended claim 30. Reply Br. 34–35

Appellant argues claim 32 is not indefinite, because a time-series is possible in the recited method, and also claim 32 additionally recites “extruding a food component such that the food component is received with the casing material,” such that extrusion occurs when the third portion receives the food component. Appeal Br. 32; Reply Br. 37. Appellant contends that a time-series is possible if the operations are performed on varying sections of the casing material. *Id.*

Discussion

During examination, “[a] claim is indefinite when it contains words or phrases whose meaning is unclear.” *In re Packard*, 751 F.3d 1307, 1310, 1314 (Fed. Cir. 2014 (per curiam) (citing Manual of Patent Examining Procedure § 2173.05)).

Claim 31

As to claim 31, in this case, we agree with the Examiner that claim 31 is unclear, at least because as written, it is not clear how the “surface” of the

first portion can receive the additive as recited in claims 30 and 31, and also a food component as recited in claim 31, even taking into account a particular time sequence of the method as argued by Appellant.

Claim 32

Claim 32 recites, in pertinent part, “processing a surface of the casing material prior to applying the additive to the surface of the casing material” and “wherein the processing of the surface of the casing material occurs simultaneous with the extruding and the additive applying steps such that a first portion of the surface is processed while a second portion of the surface receives the additive while a third portion of the surface receives the food component.”

We agree with the Examiner that as written, the relationship between the processing of the surface and recited simultaneous extruding and additive application steps is unclear, where claim 32 further requires processing a surface of the casing material prior to applying the additive to the surface of the casing material. Although Appellant argues that a time sequence is possible, claim 32 does not recite the time sequence to relate the surface processing, additive applying, and extruding steps so that it is clear that the first, second, and third surfaces subject to the processing steps are the same surfaces subjected to the additive applying and extruding steps in the order argued by Appellant. That claim 32 recites how the first, second, and third surfaces are attached in the last three lines of the claim, does not sufficiently relate the process steps thereto.

As a result, we affirm the Examiner’s rejection of claims 31 and 32 as indefinite.

Rejection 2

Appellant presents arguments only with respect to claim 30 subject to this rejection. *See* Appeal Br. 15. We select claim 30 as representative for disposition of this rejection. 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner's Rejection

In rejecting claims 30 as anticipated by Townsend, the Examiner found Townsend discloses a method of providing a casing material, extruding a food component such that the food component is received within the casing material, applying an additive to a surface of the casing material, where at least a portion of the additive is absorbed into and consumable with the food component as recited in claim 30. Ans. 4–5.

Appellant's Contentions

Appellant contends Townsend discloses an additive liquid, which contacts the exterior surface of the meat emulsion, but Townsend discloses the additive does not become intermixed with the meat emulsion. Appeal Br. 13. As a result, Appellant contends Townsend does not disclose at least a portion of the additive is absorbed into the food component as recited in claim 30. Appeal Br. 13–14. Appellant argues Townsend disparages prior art embodiments where the additive penetrates or is absorbed into the food component. *Id.* Appellant argues the Examiner does not rely on such prior art embodiments disclosed in Townsend, but rather relies on embodiments in the detailed description of Townsend. *Id.* at 14. Appellant argues the Examiner has unreasonably found claim 30 to read on embodiments disclosed in Townsend. *Id.* at 14–15.

Issue

Has Appellant demonstrated reversible error in the Examiner's position that Townsend discloses a method of making a food product, where a portion of the additive is absorbed into and consumable with the food product as recited in claim 30?

Discussion

We are not persuaded by Appellant's arguments. Although Appellant argues Townsend disparages prior art devices and methods where a liquid material penetrates an extruded meat emulsion (Townsend, col. 1, ll. 15–20; col. 3, ll. 30–34), Townsend discloses the recited steps of the method of making a food product recited in claim 30.

In particular, as the Examiner found, and Appellant does not dispute, Townsend discloses an in-line method where an additive is applied to a surface of the casing material as a food component is being received within the casing material. Indeed, Townsend discloses a meat stuffing machine where an additive, liquid smoke, is applied to the interior surface of the casing as a meat emulsion is fed through bores into the casing such that the casing carries a film of additive before the meat emulsion comes into contact with the casing. Townsend, col. 3, ll. 8–30; Figs. 2–5.

In this regard, the Specification describes that suitable additives include liquid smoke. Spec. ¶ 35. Although the Specification states generally that at least a portion of the additive is absorbed into the interior of the food component, the Specification does not provide any particular description of techniques that would differentiate the method recited in

claim 30 from the method disclosed in Townsend. *See* Spec. ¶¶ 39, 51, 54, 63, 79, 81. “Where, as here, the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product.” *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). Thus, Appellant has not demonstrated reversible error on the part of the Examiner, where the method recited in claim 30 and the method disclosed in Townsend are substantially identical, and thus would be expected to produce products with the same characteristics.

Accordingly, we affirm the Examiner’s rejection of claims 30 and 31.

Rejection 3

The Examiner’s Rejection

Claim 27 recites a method of making a food product, including applying an additive in an in-line manner, where the additive is “non-uniformly applied to the surface of the casing material such that an exterior of the food component . . . has a blotchy appearance.”

In rejecting claim 27 as obvious over Townsend alone, the Examiner found Townsend does not expressly disclose the additive is applied in a non-uniform manner and has a blotchy appearance, but determined the appearance of the additive in the final product is a design choice and does not provide a patentable feature over the prior art. Ans. 6–7.

Claim 29 recites a method of making a food product, including applying an additive in an in-line manner, where the additive is applied to the surface in liquid form, further comprising “maintaining the additive at a

first temperature” and “applying the additive to the surface of the casing at a second temperature, the second temperature being cooler than the first temperature.”

In rejecting claim 29 over Townsend alone, the Examiner found Townsend does not expressly disclose maintaining an additive at a first temperature and applying the additive to a surface of the casing at a second temperature cooler than the first temperature. Ans. 7. The Examiner determined that the temperature that the additive is maintained and applied is contingent upon the particular additive selected in order to maintain sufficient fluidity for application. *Id.*, citing Townsend, col. 3, ll. 8–13. The Examiner determined it would have been obvious to have optimized the first and second temperatures in the method of Townsend through routine experimentation with the expectation of successfully applying the additive to the casing. *Id.* at 7–8.

Appellant’s Contentions

Appellant sets forth similar arguments with respect to claims 27 and 29 as for claim 30, which we found unpersuasive as discussed above. Appeal Br. 16–17, 22–23.

For claim 27, Appellant further argues that Townsend disparages non-uniform application such that it was inappropriate for the Examiner to rely on such a rationale in rejecting the claim. *Id.* at 17–19; Reply Br. 15–18. Appellant argues also that the non-uniform additive application results in a different structure and function than the prior art. *Id.* at 19–22.

For claim 29, Appellant argues additionally that the Examiner has misapplied the optimization doctrine, because Townsend does not suggest

using different maintenance and application temperatures of the additive. *Id.* at 23–24; Reply Br. 20–21.

Issues

Has Appellant demonstrated reversible error in the Examiner’s position that it would have been obvious to have applied the additive as disclosed in Townsend in a non-uniform manner as recited in claim 27?

Has Appellant demonstrated reversible error in the Examiner’s position that it would have been obvious to have maintained an additive at a first temperature and applied an additive at a second temperature cooler than the first temperature as recited in claim 29?

Discussion

Claim 27

We are not persuaded by Appellant’s arguments that Townsend disparages meat products with a non-uniform appearance. Townsend only discloses that prior art devices and methods are not capable of uniformly applying the liquid to the entire surface of the meat product. Townsend, col. 1, ll.15–17. Townsend does not disparage meat products themselves having a non-uniform appearance depending on the particular meat product being produced.

As to Appellant’s contention that the non-uniform appearance results in a structural difference from Townsend and would not be a design choice, Appellant’s argument is belied by the Specification itself, which states additive is applied in a non-uniform manner “such that the exterior of the food component may be non-uniform, blotchy, or otherwise uneven in

appearance, which may provide a more natural or otherwise preferred appearance to the food component.” Spec. ¶ 50. Thus, non-uniform application of the additive does not provide a different structure to the food product, but rather affects the appearance of the food product, which supports the Examiner’s position that non-uniform application of additive to food products in order to produce a food product having a blotchy⁴ appearance, would have been an obvious design choice.

Accordingly, we affirm the Examiner’s rejection of claim 27.

Claim 29

As to claim 29, we are persuaded by Appellant’s argument that the Examiner has not provided sufficient reasoning that the additive temperatures recited therein would have been obvious. The Examiner appears to rely on Townsend’s disclosure that the additive is a “liquid” in order to support the position that the additive temperature in claim 29 would have been obvious. Townsend, col. 3, ll. 13–17. However, Townsend does not discuss any particular limitations on temperature, nor does Townsend discuss the additive being applied at a temperature that is cooler than a temperature the additive is maintained at as recited in claim 29.

Accordingly, the Examiner has not set forth sufficient rational underpinnings to support the position that the temperatures of additive would have been

⁴ As to having a “blotchy” appearance, the Specification does not provide any particular description of the limits of what type of non-uniform appearance might be considered to be “blotchy.” Spec. ¶ 50. Thus, we consider the term “blotchy” to be subjective and broad as depending on the perception of a person viewing the meat product.

optimized from Townsend's disclosure to arrive at the temperature relationship recited in claim 29.

Accordingly, we reverse the Examiner's rejection of claim 29 as obvious over Townsend.

Rejection 4

We limit our discussion to claim 30, which is sufficient to dispose of the issues related to this rejection.

The Examiner's Rejection

In rejecting claim 30 as obvious over Jon and Bolin, the Examiner found Jon discloses a method including stuffing a casing material with a food component and applying an additive to a surface of the casing material as the food component is being received within the casing material. Ans. 8. The Examiner found Jon discloses at least a portion of the additive is transferred from the casing material to the food component after the food component is received within the casing material and the additive is absorbed into and consumable with the food component. Ans. 8. The Examiner found Jon discloses simultaneous processing of the surface of the casing material, extruding, and additive applying steps. *Id.* at 9. The Examiner found Jon does not disclose extruding a food component such that the food component is received within the casing material. *Id.*

The Examiner found Bolin discloses sausage emulsions may be transferred to stuffers for extruding the emulsion into casings. *Id.* As a result of Bolin's disclosure along with Jon's disclosure that casing may be used with automatic food stuffing equipment, the Examiner determined it

would have been obvious to have extruded the food component during the stuffing step of Jon with expectation that the food component would have been successfully received within the casing material. *Id.* at 9–10.

Appellant's Contentions

As to claim 30, Appellant argues the Examiner did not provide sufficient reasoning to reject the claim and also that Jon does not disclose applying an additive to casing material and depositing food component in casing material simultaneously. *Id.* at 30; Reply Br. 31. Appellant argues the prior art uses two different machines, one to apply additive to a first roll of casing, and another machine to deposit food in a second roll of casing that has already received the additive, which does not satisfy claim 30 because claim 30 recites simultaneous processes on a continuous piece of casing material. Reply Br. 31–32.

Issue

Has Appellant demonstrated reversible error in the Examiner's position that it would have been obvious to have arrived at the method recited in claim 30 in view of Jon and Bolin?

Discussion

We are persuaded by Appellant's arguments. The Examiner's rationale relies on combining the casing treating machine of Jon with well-known stuffing machines as disclosed in Bolin. Jon discloses coating the inside of casings with bixin colorant, where the coated casings may be wound on a reel or go directly to a shirring operation to be shirred into

sticks. Jon, col. 30, l. 21 – col. 31, l. 57; Fig. 1. Bolin discloses sausage doughs may be transferred to stuffers for extruding dough mixes into casings. Bolin, col. 4, ll. 29–32. The Examiner has not provided sufficient reasoning to support the position that when combining the disclosures of Jon and Bolin, one of ordinary skill in the art would have arrived at the method in claim 30 of “applying an additive to a surface of the casing material in an in-line manner as the food component is being received within the casing material” as recited in claim 30.⁵

That is, the Examiner has not provided sufficient support that it would have been within the level of the ordinary skilled artisan to have combined the separate methods of Jon, which produce rolls or shirred sticks of coated casings, and Bolin, which discloses that cases are stuffed, in the manner recited in claim 30, as opposed to one machine that would coat one roll of casing while another machine stuffed food into a previously coated roll of casing as argued by Appellant.

Accordingly, we reverse the Examiner’s rejection of claims 27 and 29–32 as obvious over Jon and Bolin.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
31, 32	112	Indefiniteness	31, 32	
30, 31	102	Townsend	30, 31	
27, 29	103	Townsend	27	29
27, 29–32	103	Jon, Bolin		27, 29–32

⁵ Independent claims 27, 29, and 32 recite similar language.

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Overall Outcome			27, 30–32	29
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TIME PERIOD FOR RESPONSE

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-IN-PART