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EXAMINER
SMITH, PRESTON

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LOREN VELTROP, PHILLIP GRISHAM, BROOK GRISHAM, MICHAEL RAINONE, CLINT THOMPSON, and TALBOT PRESLEY

Appeal 2019-002107
Application 13/326,607
Technology Center 1700

Before JEFFREY T. SMITH, LILAN REN, and
SHELDON M. McGEE, *Administrative Patent Judges.*

REN, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the Examiner's decision to reject claims 1–5, 7, 11–14, 16, 21, and 22. *See* Non-Final Act. 4, 7.[2] We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

The claims are directed to "a method and apparatus for extending or preserving the palatability of a cooked food product." Spec. ¶ 2. Claim 1, reproduced below, is illustrative of the claimed subject matter:

> 1. A method of reducing cooked food degradation comprising:
>
> providing a cooked food product consisting of one or more cooked protein patty food products to an encapsulated environment device, the cooked food product patty having a first volume, the encapsulated environment device comprising a base portion that receives the cooked food product patty and a cover for the base portion, the base portion and cover defining a limited headspace for the cooked food product, the encapsulated environment device, when the cover is on the base portion, having an internal pressure within the encapsulated environment device that is equal to ambient pressure, and the encapsulated environment device having a second volume, the second volume being greater than the first volume but less than ten times the first volume;

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[1] We use the word Appellant to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as "PRINCE CASTLE, LLC." Appeal Br. 2.

[2] The record indicates that the Examiner issued Non-Final Actions on April 11, 2013, February 25, 2014, September 12, 2014, and October 24, 2017, as well as Final Actions on May 21, 2014, June 9, 2015, and June 30, 2016. Our Decision references the Non-Final Action dated October 24, 2017 from which this appeal was taken.

removing by-products of the cooked food product patty, which escape from the cooked food product patty into the second volume, from the encapsulated environment device by allowing air flow into and out of the second volume; and

maintaining the cooked food product patty at an elevated temperature within the encapsulated environment device for a predetermined length of time by placing the encapsulated environment device inside a food holding cabinet, which is sized, shaped and arranged to be capable of receiving and supporting a plurality of encapsulated environment devices adjacent to each other in a compartment therein and additionally configured to provide heat energy to the encapsulated environment devices, and by maintaining the temperature inside the compartment of the food holding cabinet at a temperature that is equal to or greater than about one-hundred forty degrees F, for the predetermined length of time.

Claims Appendix (Appeal Br. 8–9).

REFERENCES

The prior art references relied upon by the Examiner are:

Name	Reference	Date
Guibert	US 4,112,916	Sep. 12, 1978
Daswick	US 4,137,333	Jan. 30, 1979
Fay	US 4,497,431	Feb. 5, 1985
Brown	US 4,567,341	Jan. 28, 1986
Wendt	US 4,972,059	Nov. 20, 1990

REJECTIONS

Claims 1–4, 7, 11–14, 16, and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown, in view of Fay, and Guibert. Non-Final Act. 4.

Claim 5 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown in view of Guibert, Fay, and Wendt. Non-Final Act. 7.

Claim 22 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown in view of Fay, Guibert, and Daswick. Non-Final Act. 7.

OPINION

We review the appealed rejections for error based upon the issues identified by Appellant 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.")). After having considered the evidence presented in this Appeal and each of Appellant's contentions, we are not persuaded that reversible error has been identified, and we affirm the Examiner's rejections for the reasons expressed in the Final Office Action and the Answer. We add the following primarily for emphasis.

In rejecting claim 1, the Examiner finds, *inter alia*, that Guibert teaches using a hot-air oven to maintain the temperature of cooked food which corresponds to the recited "maintaining the cooked food product patty at an elevated temperature . . ." step. Non-Final Act. 4–5 (citing various portions of Guibert). The Examiner reasons that based on Guibert's teaching of heating food at a temperature of 150 Fahrenheit for an hour, a skilled artisan would have combined the teaching of Guibert with that of Brown (corresponding to the steps of "providing a cooked food product" and "removing by-products of") to arrive at the "maintaining" step. *Id.* at 5.

Appellant does not dispute Guibert's teachings but argues that the Examiner's proposed combination would render Brown unsatisfactory for its intended purpose. Appeal Br. 5. Appellant argues that because the pizza

carton in Brown is specifically designed for microwave ovens, combining Brown with the hot-air oven in Guibert would render the pizza carton inoperable for its intended purpose. *Id.* Appellant argues that because heating by microwave is based on microwave energy which differs from the thermal energy used in a hot-air oven, food would not cook the same way in a hot-air oven as it would in a microwave oven. *Id.* at 5–6.

Appellant's argument is not persuasive as it attacks the references individually, rather than considering what the combined references would have suggested to the person of ordinary skill in the art. "Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references." *In re Merck & Co. Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). In this case, the claim recites "maintaining the cooked food product patty at an elevated temperature . . ." without requiring any particular apparatus to achieve heat conservation. All of the features of Guibert — such as the hot-air oven — need not be bodily incorporated into Brown and the skilled artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment. *See Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984).

Appellant's argument is not persuasive also because it is not supported by evidence. For example, Appellant argues, without evidentiary support, that the metal foil in the microwave carton would be expected to rapidly pass the thermal energy (from the hot-air oven) to the food underneath the metal foil rendering the microwave carton inoperable for its intended purpose of cooking the food. Appeal Br. 6. Such "[a]ttorneys'

argument is no substitute for evidence." *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989).

Based on the foregoing, we sustain the rejection of claim 1. Appellant does not argue separately the rejections of claims 2–5, 7, 11–14, 16, 21, and 22 and these rejections are sustained as well. *See* Appeal Br. 2–7; *see also* 37 C.F.R. § 41.37(c)(1)(iv).

CONCLUSION

The Examiner's rejections are affirmed.

More specifically,

DECISION SUMMARY

Claims Rejected	**35 U.S.C. §**	**Reference(s)/Basis**	**Affirmed**	**Reversed**
1–4, 7, 11–14, 16, 21	103(a)	Brown, Fay, Guibert	1–4, 7, 11–14, 16, 21	
5	103(a)	Brown, Fay, Guibert, Wendt	5	
22	103(a)	Brown, Fay, Guibert, Daswick	22	
Overall Outcome	103(a)		1–5, 7, 11–14, 16, 21, 22	

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