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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ALAN BACKUS

Appeal 2019-004829
Application 14/723,758
Technology Center 1700

Before LINDA M. GAUDETTE, BRIAN D. RANGE, and
JANE E. INGLESE, *Administrative Patent Judges*.

RANGE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–4 and 11–17. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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 Alan Backus. Appeal Br. 4.

CLAIMED SUBJECT MATTER²

Appellant describes the invention as relating to immersion cooking of foods in liquid. Spec. ¶ 1. In particular, the Specification describes that the known sous vide cooking method (placing food in a heat sealed bag under vacuum and then heating the bag with boiling water) suffers from high cost of equipment and cost of bags. *Id.* ¶¶ 2–8. To address these short comings while achieving a result similar to sous vide cooking, the Specification describes wrapping food in pliable outer skins (such as with aluminum foil) and making use of heated oil rather than boiling water. *Id.* at 21–25. Claims 1, 3, and 4 are the three independent claims on appeal. Claim 1 is illustrative and is reproduced below with emphases added to certain key recitations:

1. A food preparation method, comprising the steps of:
wrapping food within a pocket formed from a pliable, liquid tight, formable metallic sheet;
at any time prior to cooking of the food, forming the pliable, liquid tight, formable sheet to conform to outer food surfaces;
at any time after wrapping of the food, placing the conformed sheet and its contained food into cooking temperature oil, which is below an associated water boiling point, such that the contained food is disposed in the pocket and below a surface of the oil;
placing the conformed sheet and contained food in the oil for a first cooking session which is long enough for an initial, sous vide style cooking of the food to occur;
raising a temperature of the oil to above the water boiling point;
placing the conformed sheet and its contained food, in the above water boiling point oil for a second cooking session,

² In this Decision, we refer to the Final Office Action dated May 23, 2018 (“Final Act.”), the Appeal Brief filed Dec. 18, 2018 (“Appeal Br.”), and the Examiner’s Answer dated Feb. 5, 2019 (“Ans.”).

after the initial cooking, which is long enough for secondary cooking of the food to occur by contact with an inner surface of the conformed sheet such; and
removing the food from the oil.

Appeal Br. 19 (Claims App.). Claims 3 and 4 similarly require wrapping food in a liquid tight metallic sheet, placing the sheet and contained food in oil, and raising the temperature of the oil to an above water boiling point temperature. *Id.* at 20.

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

<u>Name</u>	<u>Reference</u>	<u>Date</u>
Taylor et al. ("Taylor")	US 2008/0066624 A1	Mar. 20, 2008
Tucker	US 2010/0195939 A1	Aug. 5, 2010
Storek et al. ("Storek")	WO 2013/026051 A2	Feb. 21, 2013

The Butcher's Info Blog, <http://butcherinfoblog.blogspot.com/2010/01/todays-wordplasticized.html> (dated January 2010) ("Butcher's Info").

REJECTIONS

The Examiner maintains (Ans. 3) the following rejections on appeal:

- A. Claims 1 and 2 under 35 U.S.C. § 103 as obvious over Taylor in view of Storek and Butcher's Info. Ans. 3–4.
- B. Claims 3, 14, and 15 under 35 U.S.C. § 103 as obvious over Storek, Tucker, and Butcher's Info. *Id.* at 7.
- C. Claims 4, 11–13, 16, and 17 under 35 U.S.C. § 103 as obvious Taylor in view of Storek, Butcher's Info, and Tucker. *Id.* at 9.

OPINION

The Examiner has the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) (“[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability.”). To establish a *prima facie* case of obviousness, the Examiner must show that each and every limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art or the inferences and creative steps a person of ordinary skill in the art would have employed. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007); *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988).

Here, the Examiner rejects (1) claim 1 as obvious over Taylor in view of Storek and Butcher’s Info, (2) claim 3 as obvious over Storek in view of Tucker and Butcher’s Info, and (3) claim 4 as obvious over Taylor in view of Storek, Butcher’s Info, and Tucker. For each rejection, the Examiner finds that Storek teaches cooking food in oil raised above the boiling point of water. Ans. 5, 8, 10. The Examiner determines, for claims 1 and 4, that it would have been obvious to modify Taylor’s *sous vide* cooking method to use oil in order to cook at a higher temperature. *Id.* at 5, 10–11. For claim 3, the Examiner finds that it would have been obvious to modify Storek’s method to include Tucker’s vents to keep pressure from building during the cooking process. *Id.* at 8.

The Examiner finds that Taylor and Storek are silent regarding the food sheet being metallic. *Id.* at 6. The Examiner finds that Butcher’s Info blog teaches using metallic foil in *sous vide* cooking. *Id.* at 6–7. The

Examiner determines that it would have been obvious to modify the combination of Taylor and Storek to use aluminum foil to prevent undesired reactions and leaching of plastic bags into the food. *Id.*

Appellant argues that Butcher's Info does not suggest use of aluminum foil as part of a sous vide cooking process. Appeal Br. 9–10. The preponderance of the evidence supports Appellant's position. Butcher's Info explains that the sous vide cooking process can be problematic because, when cooking with the plastic bags, they may leach undesirable chemicals into the food. Butcher's Info 2. In this context, Butcher's Info elaborates on the risk of using plastic by stating that "Aluminum foil is a better choice for covering fatty hot foods." *Id.* at 2. We do not, however, read Butcher's Info as suggesting that aluminum foil be used to tightly cover the food and then immerse the food in liquid for cooking (i.e., in a sous vide style). Rather, Butcher's Info appears to reference aluminum foil merely as a point of a comparison in explaining the risks of exposing hot fatty foods to plastic. The Examiner responds by finding that Butcher's Info teaches that aluminum foil is suitable for contacting hot foods. Ans. 17. This explanation, however, falls short of explaining why a person of skill in the art would use aluminum foil to cover food as part of a sous vide type cooking method.

The Examiner also determines that a person of skill in the art would use the foil "in sous vide cooking that requires higher temperatures than what would normally be suitable in only plastic bags." Ans. 6–7. Appellant, however, argues that the references do not teach sous vide cooking in oil (i.e., with oil having a higher boiling point thus enabling higher temperature cooking). Appeal Br. 6–8. Again, the preponderance of the evidence supports the Appellant's position. The Examiner relies on Storek paragraph

29 for teaching a sous vide method using oil (thereby enabling cooking above water's boiling point). Ans. 13–14. Storek paragraph 29, however, indicates that in one step the food product is “exposed to a liquid” where the liquid could be “water, juice, oils, sauces, batters, coatings, among others.” Storek, thus, at this paragraph does not teach a high temperature sous vide method using oil. *See* Appeal Br. 6–7 (explaining how the Examiner is combining disparate embodiments of Storek). Indeed, the Storek's reference to sauces and batters suggests direct contact with food product rather than use of an intervening liquid barrier such as plastic (or, as the Examiner suggests, foil). Similarly, Storek's paragraph 115 also discusses cooking food in oil but then suggests “sous-vide . . . in a water bath” as an alternative (using the words “[i]n, addition”). *See* Storek ¶ 115.

Based upon the record as a whole and as explained above, the Examiner has not adequately established that a person of skill in the art would have had reason to reach the independent claims' recitations concerning wrapping food in a formable metallic sheet and placing the wrapped food into heated oil. We, therefore, do not sustain the Examiner's rejections.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2	103	Taylor, Storek, Butcher's Info		1, 2
3, 14, 15	103	Storek, Tucker, Butcher's Info		3, 14, 15
4, 11-13, 16, 17	103	Taylor, Storek, Butcher's Info, Tucker		4, 11-13, 16, 17
Overall Outcome				1-4, 11-17

REVERSED