

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SUSAN M. HAYES-JACOBSON

Appeal No. 2004-1508
Application No. 09/443,559

ON BRIEF

Before OWENS, KRATZ, and PAWLIKOWSKI, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-11 and 33-37, which are all of the claims pending in this application.

BACKGROUND

Appellant's invention relates to a filled food product that includes a flowable filling encased within a seamless and continuous structure that is edible and surrounds the filling. An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

1. A filled food product comprising a food structure and a flowable filling, wherein the flowable filling is encased and sealed within a seamless food structure that is continuous and surrounds the filling, the food structure comprising cooked, hydrated flour and a moisture content between about 20 percent by weight and about 60 percent by weight.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

James et al. (James)	1,597,979	Aug. 31, 1926
Heim (German Patent Publication)	DE 195 24 209	Feb. 01, 1998

Claims 1-11 and 33-37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Heim. Claims 1-11 and 33-37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over James.

OPINION

We reverse the examiner's § 103(a) rejection over Heim and affirm the examiner's § 103(a) rejection over James. Our reasoning follows.

Rejection over Heim

All of the claims on appeal require that the product foodstuff includes a filling "encased and sealed within a seamless food structure that is continuous and surrounds the

filling" (independent claim 1). While the examiner acknowledges that Heim discloses a filled food that includes a hole in the "food structure" that surrounds the filling, the examiner takes the position that "there is no disruption in the structure" (answer, page 4). Thus, the examiner is of the view that the claim 1 language does not patentably distinguish over the product of Heim because "[t]he hole is the same as the pores present in the claimed product as shown in figure 7." Id.

Appellant, on the other hand, urges that the terms of the claim 1 language quoted above are clear and understandable from their plain meaning. Moreover, when claim 1 is read in light of the specification (see, e.g., page 8, lines 12-16), it is manifest, in appellant's view, that a throughhole¹ in the encasing food structure is not permitted by that language.

We agree with appellant because the examiner has not carried the burden of establishing that the hole in the surrounding cake made by the probe filling method of Heim would result in, or otherwise suggest, a food product that is characterized by a "flowable filling encased and sealed within a seamless food

¹ Heim employs a probe (16, fig. 1) to fill a cake piece with a filling, which results in a hole in the surrounding food material that extends at least to the location of the filling that is inserted there within.

structure that is continuous and surrounds the filling." In this regard, the examiner has not shown where in Heim there is any teaching that the hole formed in the cake would nonetheless result in a flowable filling that is sealed in a surrounding continuous structure as called for in appellant's claims. We note that the examiner's references to appellant's drawing figure 7 is not persuasive of any disclosure in Heim that suggests the claimed product. Moreover, to the extent that the examiner is arguing that the claim 1 language should be interpreted as being broad enough to permit "probe filling" holes therein as employed by Heim, we disagree. While the claims are given their broadest reasonable interpretation consistent with the specification, we do not subscribe to the examiner's viewpoint that the claim terms should be construed as permitting open fill holes as in Heim for the reasons outlined above and in appellant's brief. Consequently, we reverse the stated § 103(a) rejection over Heim on this record.

Rejection over James

At the outset, we observe that appellant (brief, page 9) states that the appealed claims stand or fall together. Accordingly, we select independent claim 1 as the representative claim on which we decide this appeal as to this rejection. See

37 CFR § 1.192(c)(7)(2002).

Appellant does not contest the examiner's determination that James suggests the product of representative claim 1 including a seamless food structure that is continuous and surrounds a filling sealed there within except for an alleged lack of teaching to employ a "flowable" filling. Nor does appellant contest the examiner's factual findings regarding the well known use of flowable fillings in doughnuts. Rather, appellant maintains that "[o]ne of ordinary skill in the art would not have been motivated to replace a sausage filling as disclosed by James with a flowable food material to make the present invention" (brief, page 14). We disagree with appellant principally because the disclosure of James is not confined to a sausage filled food product. As correctly and completely explained by the examiner at pages 4-6, 7 and 8 of the answer, James (page 1, lines 68-72) discloses the use of "a variety of forms" of filler and teaches the formation of, inter alia, sweet products, such as a filled doughnut (page 1, lines 58-68). We agree with the examiner that one of ordinary skill in the art at the time of the invention would have been led to employ conventional flowable fillings, such as a fruit or jelly filling, that are compatible with a sweet product, such as the doughnut option of James. In this

regard, we note that appellant has not even specifically addressed the examiner's obviousness position as clearly laid out on this record, much less convinced us of any error therein. It follows that we will affirm the examiner's § 103(a) rejection over James.

CONCLUSION

The decision of the examiner to reject claims 1-11 and 33-37 under 35 U.S.C. § 103(a) as being unpatentable over Heim is reversed. The decision of the examiner to reject claims 1-11 and 33-37 under 35 U.S.C. § 103(a) as being unpatentable over James is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Terry J. Owens)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
Peter F. Kratz)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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Beverly A. Pawlikowski)	
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