

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**Appl. No.** : **13/691,176**  
**1<sup>st</sup> Named Inventor** : **Arora**  
**Filed** : **November 30, 2012**  
**Title** : **Shelf-Stable Food Product**

**Examiner** : **LeBlanc**  
**TC/A.U.** : **1791**

**Docket No.** : **7748US01**  
**Customer No.** : **30173**

**Commissioner for Patents**  
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**APPLICANT'S APPEAL BRIEF**

The Applicant of the above-identified U.S. patent application submits this Appeal Brief in support of an appeal from the August 22, 2016 final rejection of claims 41-52 in this application.

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## **I. REAL PARTY IN INTEREST**

The above-identified patent application is assigned to General Mills, Inc. as recorded with the United States Patent and Trademark Office on March 7, 2013 on Reel No. 029938, Frame No. 0414 and on October 3, 2013 on Reel No. 031336, Frame No. 0190.

## **II. RELATED APPEALS AND INTERFERENCES**

There do not exist any known related appeals or interferences that would directly affect or be directly affected by or have a bearing on the decision in this case.

## **III. STATUS OF CLAIMS**

Presently, claims 41-52 are pending, as claims 1-40 have been canceled. In the Office Action dated August 22, 2016, claims 41-52 were rejected in various ways. However, in the Advisory Action dated November 15, 2016, the rejections under 35 U.S.C. § 112 and some of the rejections under 35 U.S.C. § 103 were withdrawn. As a result, of the pending claims, only claims 41-51 stand finally rejected. Therefore, no prior art or other rejections have been applied against claim 52 which is therefore, presumably, allowable. The rejected claims are herewith appealed.

## **IV. STATUS OF AMENDMENTS**

Claim 41 was amended in the Amendment/Response After Final dated October 3, 2016. This amendment was entered for purposes of appeal. See the Advisory Action dated November 15, 2016.

## **V. SUMMARY OF CLAIMED SUBJECT MATTER**

Independent claim 41 is directed to a method for forming a food product 10, as shown in Figures 1, 2 and 6 and discussed beginning at page 12, line 4. Shortening 51 is combined with

water 52 to form a shortening mixture 53. Solid or semi-solid shortening 51 is heated to a temperature of at least 150 °F prior to combining shortening 51 with water 52. Alternatively, shortening mixture 53 is heated after combining shortening 51 with water 52. See Figure 6 and page 12, lines 9-26. Dehydrated crumbs 54, having a moisture content less than 10% and a water activity of 0.2 to 0.6, are combined with shortening mixture 53 at a ratio of dehydrated crumbs 54 to shortening mixture 53 of 1.5:1 to 0.75:1 to form a crumb mixture 55, as shown in Figure 6 and discussed at page 13, lines 1-17 and at page 8, lines 6-8. Crumb mixture 55 is formed into a plurality of cores 56, each of the plurality of cores 56 being capable of maintaining a shape, as shown in Figure 6 and discussed at page 13, lines 23-29 and at page 5, lines 19-31. Each of the plurality of cores 56 is coated with a confectionary coating to form a respective shell over each of the plurality of cores 56, as shown in Figures 1, 2 and 6 and discussed at page 13, line 30 to page 14, line 7 and at page 5, lines 19-31. After coating, crumb mixture 55 of each of the plurality of coated cores 58 has a water activity of 0.5 to 0.8, as discussed at page 14, lines 15-18.

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

A. The rejection of claims 41-51 under 35 U.S.C. § 103(a) as being unpatentable over Leavitt (“Cake Concepts by Cathy”, hereinafter “Leavitt”) in view of Bourns et al. (U.S. Patent No. 5,529,800, hereinafter “Bourns”) and Beuchat (“Water Activity of Some Foods and Susceptibility to Spoilage by Microorganisms”, hereinafter “Beuchat”)

## **VII. ARGUMENTS**

A. The rejection of claims 41-51 under 35 U.S.C. § 103(a) as being unpatentable over Leavitt (“Cake Concepts by Cathy”, hereinafter “Leavitt”) in view of Bourns et al. (U.S. Patent No. 5,529,800, hereinafter “Bourns”) and Beuchat (“Water Activity of Some Foods and Susceptibility to Spoilage by Microorganisms”, hereinafter “Beuchat”)

The Examiner has the initial burden of showing a *prima facie* case of obviousness. See *In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006). In order to establish a *prima facie* case of

obviousness, each and every limitation of the claims must be considered. See M.P.E.P. § 2143.03 citing *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). There must be an apparent reason for one of ordinary skill in the art to combine known elements in the fashion claimed by the patent at issue. This analysis should be made explicit. See *KSR International Co. v. Teleflex Inc.*, 127 U.S. 1727, 1732 (2007), citing *In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006).

1) Claims 41-43

The Examiner relies on Leavitt for most of the limitations of claim 41 but does admit that Leavitt fails to disclose the claimed shortening mixture and the claimed water activity. As a result, the Examiner relies on Bourns and Beuchat, respectively, for these limitations. See pages 3-6 of the Office Action.

Among other limitations, claim 41 recites combining dehydrated crumbs having a moisture content of less than 10% and a water activity of 0.2 to 0.6 with a shortening mixture at a ratio of the dehydrated crumbs to the shortening mixture of 1.5:1 to 0.75:1. Claim 41 also recites that, after coating, a crumb mixture of each of a plurality of coated cores has a water activity of 0.5 to 0.8. The Examiner has not shown the claimed moisture content, water activities or crumb to shortening ratio in the prior art. Instead, the Examiner has simply argued that these features would have been obvious. The Applicant respectfully submits that such rejections are not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). To the extent that Beuchat indicates that a low water activity can be desirable, the Examiner has provided no evidence that the claimed water activities are achievable or even desirable in connection with the method of

Leavitt. In view of the above, the Applicant respectfully requests that the rejection of claim 41 be reversed. Claims 42 and 43 will not be argued separately but will stand or fall with claim 41.

2) Claim 44

Claim 44 recites that, after coating, the crumb mixture of each of the plurality of coated cores has a water activity of 0.6 to 0.7. As with claim 41, the Examiner has not shown the claimed water activity in the prior art. Instead, the Examiner has simply argued that this feature would have been obvious. See page 6 of the Office Action. The Applicant respectfully submits that such a rejection is not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 44 be reversed.

3) Claim 45

Claim 45 recites that, prior to combining the dehydrated crumbs with the shortening mixture, the dehydrated crumbs have a water activity of 0.3 to 0.4. Again, the Examiner has not shown the claimed water activity in the prior art. Instead, the Examiner has simply argued that this feature would have been obvious. See page 5 of the Office Action. The Applicant respectfully submits that such rejections are not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application

Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 45 be reversed.

4) Claim 46

Claim 46 recites that, 24 or more hours after coating, the dehydrated crumbs have a water activity of 0.5 to 0.8. As with the various claim limitations referenced above, the Examiner has not shown the claimed water activity in the prior art. Instead, the Examiner has simply argued that this feature would have been obvious. See page 6 of the Office Action. The Applicant respectfully submits that such rejections are not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goetsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 46 be reversed.

5) Claim 47

Claim 47 recites that, 24 or more hours after coating, the dehydrated crumbs have a water activity of 0.6 to 0.7. The Examiner has not shown the claimed water activity in the prior art. Instead, the Examiner has simply argued that this feature would have been obvious. See page 6 of the Office Action. The Applicant respectfully submits that such rejections are not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected

only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 47 be reversed.

6) Claim 48

Claim 48 recites that the respective shell of each of the plurality of coated cores is less than or equal to 5 millimeters thick. The Examiner has not shown this limitation in the prior art. Instead, the Examiner argues that it would have been obvious to “adjust the size of the shell depending on the amount of chocolate taste desired by the consumer”. See page 6 of the Office Action. In other words, the Examiner is essentially arguing that it would have been obvious to try different shell thicknesses. Such rejections are only proper when there is a finite number of possible options. See MPEP § 2143(I)(E). That is not true of the present case. Accordingly, the Applicant respectfully submits that the rejection of claim 48 is not proper and requests that this rejection be reversed.

7) Claim 49

Claim 49 recites that the respective shell of each of the plurality of coated cores is less than or equal to 50% of the coated core by weight. The Examiner has not shown this limitation in the prior art. Instead, the Examiner argues that it would have been obvious to “adjust the size of the shell in order to keep the crumb mixture together into a cohesive ball shape”. See page 7 of the Office Action. In other words, the Examiner is essentially arguing that it would have been obvious to try different relative shell and core weights. Such rejections are only proper when there is a finite number of possible options. See MPEP § 2143(I)(E). That is not true of the present case. Accordingly, the Applicant respectfully submits that the rejection of claim 49 is not proper and requests that this rejection be reversed.



8) Claim 50

Claim 50 recites packaging the plurality of coated cores, wherein, after packaging, the crumb mixture of each of the plurality of coated cores has a water activity of 0.5 to 0.8. The Examiner has not shown the claimed water activity in the prior art. Instead, the Examiner has simply held that this feature would have been obvious. See page 7 of the Office Action. The Applicant respectfully submits that such rejections are not proper. The Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight. See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 50 be reversed.

9) Claim 51

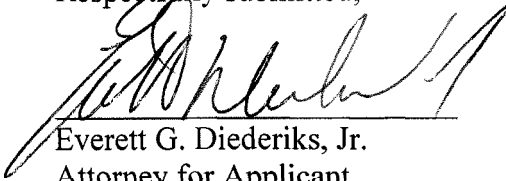
Claim 51 recites that the crumb mixture, prior to forming into the plurality of cores, has a density of 0.78 to 1.31 g/cc. The Examiner has not shown the claimed density in the prior art. Instead, the Examiner has simply argued that this feature would have been obvious. See page 7 of the Office Action. The Applicant respectfully submits that such rejections are not proper. Again, the Courts have made it clear that rejecting a claim on a combination of references is improper when the combination is missing a claim element, and a claim limitation can be properly rejected only if *substantial evidence* to support the rejection exists in the record. *In re Zurko* 258 F.3d 1379, 59 USPQ 2d 1693 (Fed. Cir. 2001). As set forth in *Ex parte Goettsch* (Case No. 2011-006303 regarding Application Serial No. 12/134,270 in a decision that was rendered March 3, 2012), the Board made clear that the Examiner has an initial duty to supply a factual basis for the rejection that is devoid of speculation, unfounded assumptions or hindsight.

See also *Ex parte Clapp*, USPQ 972, 973 (Bd. Pat App. & Int. 1985). In view of the above, the Applicant respectfully requests that the rejection of claim 51 be reversed.

B. Conclusion

For at least the reasons set forth above, the Appellant respectfully submits that the present invention is patentably defined over the prior art of record such that the Examiner's rejections should be reversed and the application passed to issue.

Respectfully submitted,



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## VIII. CLAIMS APPENDIX

41. A method for forming a food product comprising:  
combining shortening with water to form a shortening mixture, wherein combining the shortening and water includes heating solid or semi-solid shortening to a temperature of at least 150 °F prior to combining the shortening with the water; or 2) heating the shortening mixture after combining the shortening with the water;  
combining dehydrated crumbs having a moisture content less than 10% and a water activity of 0.2 to 0.6 with the shortening mixture at a ratio of the dehydrated crumbs to the shortening mixture of 1.5:1 to 0.75:1 to form a crumb mixture;  
forming the crumb mixture into a plurality of cores, each of the plurality of cores being capable of maintaining a shape; and  
coating each of the plurality of cores with a confectionary coating to form a respective shell over each of the plurality of cores, wherein, after coating, the crumb mixture of each of the plurality of coated cores has a water activity of 0.5 to 0.8.
42. The method of claim 41, wherein the dehydrated crumbs are cake crumbs, cookie crumbs, brownie crumbs or muffin crumbs.
43. The method of claim 42, wherein, prior to coating, each of the plurality of cores has a mass of 10 to 20 grams.
44. The method of claim 41, wherein, after coating, the crumb mixture of each of the plurality of coated cores has a water activity of 0.6 to 0.7.
45. The method of claim 44, wherein, prior to combining the dehydrated crumbs with the shortening mixture, the dehydrated crumbs have a water activity of 0.3 to 0.4.
46. The method of claim 41, wherein, 24 or more hours after coating, the dehydrated crumbs have a water activity of 0.5 to 0.8.

47. The method of claim 46, wherein, 24 or more hours after coating, the dehydrated crumbs have a water activity of 0.6 to 0.7.
48. The method of claim 41, wherein the respective shell of each of the plurality of coated cores is less than or equal to 5 millimeters thick.
49. The method of claim 41, wherein the respective shell of each of the plurality of coated cores is less than or equal to 50% of the coated core by weight.
50. The method of claim 41, further comprising: packaging the plurality of coated cores, wherein, after packaging, the crumb mixture of each of the plurality of coated cores has a water activity of 0.5 to 0.8.
51. The method of claim 41, wherein the crumb mixture, prior to forming into the plurality of cores, has a density of 0.78 to 1.31 g/cc.
52. The method of claim 41, wherein the water and shortening make up at least 75% of the shortening mixture.