

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DONALD B. BERNACCHI, KENNETH S. DARLEY, IRENE G.
DONHOWE, KWANG L. RHO, IOACHIM N.C. BAUR, JOHN J. PRISCIAK,
SERGIO L. ODORICO, and MICHAEL J. STEPHENSON

Appeal No. 1997-1294
Application 08/524,763¹

HEARD: April 5, 2000

Before PAK, OWENS and WALTZ, Administrative Patent Judges.

PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final

¹ Application for patent filed September 8, 1995.

Appeal No. 1997-1294
Application No. 08/524,763

rejection of claims 1 through 31 which are all of the claims remaining in the application.

Claims 1, 19, 20 and 24 are representative of the subject matter on appeal and read as follows:

1. A breading crumb product for application to a food substrate comprising, before application to the substrate, a breading crumb having incorporated therein about 1 to 10 wt% of at least one heat-set protein and up to 3 wt% added fat.

19. A food product comprising a food substrate coated with a predust, a batter and a breading crumb product, said predust and said breading crumb product having incorporated therein, before application to the substrate, about 1 to 10 wt% of at least one heat-set protein.

20. A food product comprising a food substrate coated first with a predust comprising a comminuted breading crumb product having incorporated therein, before application to the substrate, about 1 to 10 wt% of at least one heat-set protein, and then with a batter layer.

24. A method of preparing a breading crumb product for later application to a food substrate comprising:

a) preparing a breading crumb from dry and wet ingredients, in a conventional bread crumb-forming operation;

b) incorporating into the breading crumb-forming preparation at a convenient juncture, a heat-set protein chosen from the group consisting of sodium caseinate, calcium caseinate, potassium caseinate, soy protein caseinate, and soy protein isolate; and

c) completing the preparation of said breading crumb.

Appeal No. 1997-1294
Application No. 08/524,763

Claims 1 through 31 stand rejected under 35 U.S.C. § 103 as unpatentable over the disclosure of U.S. Patent 4,260,637 issued to Rispoli et al. on April 7, 1981 (hereinafter referred to as "Rispoli").²

We reverse.

The claimed subject matter is directed to "[a] breading crumb product for application to a food substrate, comprising, before application to the substrate, a breading crumb having incorporated therein about 1 to 10 wt% of at least one heat-set protein...." See, e.g., claim 1. According to pages 3 and 4 of the specification, the breading crum having incorporated therein about 1 to 10 wt% of at least heat set

² The examiner has withdrawn the rejection of claims 1 and 2 under 35 U.S.C. § 102(b) as anticipated by Rispoli. The examiner also states that "[t]he rejection of claim 27 has been dropped in view of appellants [sic, appellant's] response." However, it is not clear from the record what, if any, rejection has been dropped. It does not appear that the § 103 rejection of claim 27 over Rispoli has been withdrawn since the examiner has repeated the § 103 rejection of claims 1 through 31 over Rispoli.

Appeal No. 1997-1294
Application No. 08/524,763

protein is produced as follows:

In preparing the breading crumbs, the dry dough-forming ingredients are first mixed together and powered sodium caseinate or other heat-set protein is incorporated into the dry mixture, which then is formed into a dough. Alternatively, an aqueous dispersion of the heat-set protein may be mixed into the dough. The dough then is baked, preferably following dough stretching as in U.S. Patent No. 4,423,078, and the dough is wet sized to provide wet-sized breading crumbs. In yet another alternative approach, an aqueous dispersion of the heat-set protein may be coated onto the surface of previously formed crumbs and drawn into the crumb using a vacuum/tumbling method as discussed below.

As evidence of obviousness of the claimed subject matter under 35 U.S.C. § 103, the examiner relies on the disclosure of Rispoli. Rispoli discloses a self-sticking breading crumb composition and a method of making the same. According to the examiner (Answer, page 3),

[t]his composition contains 1 to 20% protein which may be whey protein, milk protein, soy isolate, gelatin, egg albumin or wheat gluten. At example III gum arabic and egg white solid are mixed with bread crumbs and the mixture is dried in an oven at less than 200F. Claim 1 does not appear to differ from Rispoli. The various crumbs of claim 2 are noted in example 1. The moisture

Appeal No. 1997-1294
Application No. 08/524,763

content of claim 6 is seen to be within that expected for a dried storage stable food product. Sodium caseinate of claim 7 is indicated in example 1 as a protein source. Also the protein is applied to the surface of the bread crumbs as set forth in claim 12.

The examples referred to by the examiner show protein materials, such as sodium caseinate and/or egg white solids, being combined with bread crumbs in a rotating **coating** kettle. This coating method is materially different from those methods which are said to be useful for **incorporating** heat-set proteins **into** the bread crumbs. Compare Rispoli, examples 1 and 3, with specification, pages 3 and 4. On this record, the examiner has not proffered any evidence that mixing a protein material, such as sodium caseinate and/or egg white solids, with bread crumbs in a rotating **coating** kettle, necessarily or inherently results in bread crumbs having at least about one percent of the protein material incorporated **therein**. Nor has the examiner supplied a suggestion to incorporate the claimed amount of a heat set protein material into the bread crumbs of

Appeal No. 1997-1294
Application No. 08/524,763

type described in Rispoli. Accordingly, we are constrained to reverse the examiner's decision rejecting claims 1 through 31 under 35 U.S.C. § 103 over Rispoli.

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

REVERSED

CHUNG K. PAK)
Administrative Patent Judge)

Appeal No. 1997-1294
Application No. 08/524,763

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