United States District Court,
D. New Jersey.

Melvin L. LEVINSON,
Plaintiff.
v.
SEARS, ROEBUCK & CO,
Defendant.

No. CIV. A. 96-973

May 14, 1998.

Mr. Melvin Levinson, Edison, for Plaintiff Pro Se.

Kevin W. Guynn, Esq., Hill, Steadman & Simpson, Chicago, IL, Harold I. Braff, Esq., Braff, Harris & Sukoneck, Livingston, for Defendant.

OPINION

WOLIN**, District J.**

The current case is before the Court on plaintiff *pro se* Melvin L. Levinson's November 10, 1997 motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on defendant Sears, Roebuck & Company's ("Sears") counterclaim alleging patent noninfringement or, alternatively, invalidity of U.S. Patent No. 5,094,865. Further, on said date, Levinson also filed a motion for reconsideration of this Court's Opinion and Order of October 31, 1997 ("the Order"). Thereafter, Sears cross-moved for summary judgment as to patent invalidity or, alternatively, for noninfringement. For the reasons stated herein, Levinson's reconsideration motion will be denied and the Order affirmed. Further, as to the cross-motions for summary judgment of validity or invalidity and infringement or noninfringement, the Court will grant Levinson's motion as to validity of Claims 1-4, 7-11, and 13 of the patent at issue FN1, and deny both motions as to infringement of Claims 1, 3, 4, 7, and 13 pursuant to Federal Rule of Civil Procedure 78.

FN1. The validity of Claims 5, 6, and 12 of the '865 patent is not at issue in the current case. (*See* Def.'s Br. at 20.)

This Court dismissed without prejudice Counts Four, Five, and Six of the Complaint by way of a Letter Opinion and Order dated July 16, 1996. Accordingly, only Counts One and Two alleging infringement and willful infringement, respectively, remain. There does not appear to be a Count Three named in the Complaint.

BACKGROUND

The majority of facts underlying the motions currently before the Court are set forth in this Court's

Unpublished Opinion of October 31, 1997. The Court reiterates those facts as set forth herein. Levinson owns U.S. Patent Number 5,094,865 ("the '865 patent"), issued on March 10, 1992 for a Whirlpool microwave oven-a "Two Stage Process for Cooking/Browning/Crusting Food by Microwave Energy and Infrared Energy." FN2 (Compl.para. 4.) On February 29, 1996, Levinson filed a Complaint that alleged that Sears had marketed and continued to market a product that infringed on the '865 patent. (*See* id. para. 5.) Levinson alleged that Sears ignored "multiple Notices of Infringement, demands to make restitution for past infringement and demands to cease and desists [sic] its continuing infringement." (Id. para. 11.) Consequently, Levinson sought an injunction, damages, costs, and attorneys' fees. (*See* id. at 6-7 .)

FN2. Levinson owns a number of patents. Sears' pleadings alone provide copies of approximately ten of Levinson's patents.

Sears defended and counterclaimed on the grounds that the '865 patent was (1) not infringed and/or (2) was invalid and void for failing to comply with the patentability requirements set forth in 35 U.S.C. s.s. 102 and 103. (*See* Def.'s Answ. at 7, para.para. 6,7.) Sears also sought that Levinson be permanently enjoined from bringing infringement charges or acts of enforcement or suits based on the '865 patent, in addition to costs and attorneys' fees. (*See* id. at 9.)

Levinson then moved for disqualification of Sears' counsel-Kevin W. Guynn, Esq. and Hill, Steadman & Simpson, his law firm. Levinson argued that Guynn and his assistant counsel Robert Rice acted unethically in threatening extensive litigation if Levinson did not accept a settlement offer. (*See* Appellant's Br. at 5.) Further, Levinson moved to disqualify Guynn because appellant expected to call him as a necessary witness; Guynn and Rice engaged in conversations with Levinson, observed a demonstration by Levinson, and sent documents to Levinson of which they allegedly had exclusive knowledge. (*See* id. at 6-7.) Sears opposed the motion to disqualify. Levinson also sought recusal of Magistrate Judge Pisano due to allegedly questionable impartiality (*see* id. at 11), alleged commission of numerous errors, and an alleged failure to address a preponderance of Levinson's claims. (*See* id. at 8.)

Magistrate Judge Pisano denied Levinson's motion without oral argument pursuant to Federal Rule of Civil Procedure 78. After Magistrate Judge Pisano denied Levinson's motion for reconsideration on August 4, 1997, Levinson appealed to this Court.

On October 31, 1997, this Court affirmed Magistrate Judge Pisano's Letter Order, finding that the decision was neither clearly erroneous nor contrary to law.

Levinson then moved for reconsideration of this Court's October 31, 1997 Opinion and Order, in addition to moving for summary judgment as to the validity and infringement of the '865 patent. On December 8, 1997, Sears filed its cross-motion for summary judgment as to the invalidity of the '865 patent or, alternatively, noninfringement, in addition to maintaining a request for fees and costs.

DISCUSSION

In the interest of justice, the Court will read Levinson's *pro se* petitions liberally.FN3 *See* Boag v. MacDougal, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), *reh'g denied,* 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 819 (1972); Todaro v. Bowman, 872 F.2d 43, 44 n. 1 (3d Cir.1989); Hurd v. Romeo, 752 F.2d 68, 70 (3d Cir.1985).

FN3. Further, *pro se* litigants are provided latitude by the Court. Accordingly, despite alleged defects in Levinson's pleadings-such as a failure to submit affidavits or declarations authenticating the exhibits attached to his motion in conformity with Rule 56(e) of the Federal Rules of Civil Procedure, in addition to a failure to dispute much of Sears' Undisputed Facts-the Court will address the merits of the current motions.

I. Motion for Reconsideration

Under Local Civil Rule 7.1(g), the Court has reviewed plaintiff's motion for reconsideration of this Court's Opinion and Order of October 31, 1997, denying Levinson disqualification of opposing counsel, granting Sears' application for fees and costs expended in opposing the motion to disqualify, and denying recusal of Magistrate Judge Pisano.

Local Civil Rule 7.1(g) requires that the moving party set forth "concisely the matters or controlling decisions which counsel believes the Court has overlooked." Local Civil rule 7.1(g) does not contemplate a recapitulation of arguments considered by the Court before rendering its decision, *see* Carteret Savings Bank F.A. v. Shushan, 721 F.Supp. 705, 709 (D.N.J.), *modified,* 919 F.2d 225 (3d Cir.1990); nor does the Rule contemplate advancing arguments or facts which should have been advanced at the time of the original motion, *see* Florham Park Chevron, Inc. v. Chevron U.S .A., Inc., 680 F.Supp. 159, 162 (D.N.J.1988).

A court may grant a properly filed motion for reconsideration for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. *See* Database America v. Bellsouth Advertising & Pub., 825 F.Supp. 1216, 1220 (D.N.J.1993) (quoting Weyerhaeuser Corp. v. Koppers Co., 771 F.Supp. 1406, 1419 (D.Md.1991)). Motions to reconsider or reargue are granted "very sparingly." Maldonado v. Lucca, 636 F.Supp. 621, 630 (D.N.J.1986).

A party must show more than a disagreement with the court's decision before a motion for reconsideration may be granted. *See* Panna v. Firstrust Sav. Bank, 760 F.Supp. 432, 435 (D.N.J.1991). A motion for reconsideration is improper when it is used "to ask the Court to rethink what it had already thought through-rightly or wrongly." Carteret Savings Bank, 721 F.Supp. at 706 (holding that mere "recapitulation of the cases and arguments considered by this Court before rendering its initial decision" did not warrant reargument.).

In addition, Local Civil Rule 7.1(g) has been interpreted consistently to restrict review to facts and legal arguments properly presented to the Court at the time the motion on which reargument is sought was initially decided. Thus, efforts to expand the record to include legal arguments not originally before the Court on a motion for reargument have been rejected. *See* Florham Park Chevron, 680 F.Supp. at 162; Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J.1987).

Through this motion for reconsideration, Levinson fails to raise any issue that was overlooked by the Court and brings to the Court's attention no new case law or dispositive facts in support of his position. Levinson's papers raise only his disagreement with the Court's decision, which disagreement should be dealt with via the normal appellate process, not on a motion for reargument. *See* Florham Park Chevron, 680 F.Supp. at 163. Accordingly, Levinson has not provided a sufficient basis to merit reconsideration of the Court's earlier

decision, and pursuant to Local Civil Rule 7.1(g) his motion for reconsideration of the Court's October 31, 1997 Opinion and Order will be denied.

II. Legal Precepts

A. Summary Judgment

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the burden of demonstrating that there is no genuine issue as to any material fact. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where a summary judgment motion is properly made and supported, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the adverse party fails to respond with a showing that there is a genuine issue for trial, "summary judgment, if appropriate, shall be entered against the adverse party." *Id*. In making this determination, the Court must draw all reasonable inferences in favor of the non-movant. *See* National State Bank v. Federal Reserve Bank of New York, 979 F.2d 1579, 1581 (3d Cir.1992).

The Court's function at the summary judgment stage of litigation is to determine whether there is a genuine issue for trial. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of material fact is genuine if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *See id.;* Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir.1993). Absent evidence sufficient to permit a jury to return a verdict for the non-moving party, there is no issue for trial, and summary judgment must be granted. *See* Anderson, 477 U.S. at 249. The validity issue presented in this case is appropriate for disposition by summary judgment.

B. Summary Judgment in Patent Infringement Litigation

The fact that this lawsuit involves a noninfringement analysis or the validity of a patent does not render this case unsuitable for disposition by summary judgment. Although patent infringement often cases often raise complex factual issues, "the rules do not change simply because the case involves patent law." Aid Pack, Inc. v. Beecham, Inc., 641 F.Supp. 692, 694 (D.Mass.1986), *aff'd,* 826 F.2d 1071 (Fed.Cir.1987) (citing D.M.I., Inc. v. Deere & Co., 755 F.2d 1570, 1573 (Fed.Cir.1985)). "Summary Judgment is appropriate in patent cases as in other cases under Rule 56(c)." Proctor & Gamble Co. v. Nabisco Brands, Inc., 711 F.Supp. 759, 761 (D.Del.1989).

In fact, the Federal Circuit repeatedly has upheld the grant of summary judgment in patent infringement cases where there was no genuine issue of material fact. *See, e.g.,* George v. Honda Motor Co., Ltd., 802 F.2d 432, 434 (Fed.Cir.1986); Porter v. Farmers Supply Serv., Inc., 790 F.2d 882, 884 (Fed.Cir.1986); Brenner v. United States, 773 F.2d 306, 308 (Fed.Cir.1985); Builders Concrete, Inc. v. Bremerton Concrete Prods. Co., 757 F.2d 255, 257-58 (Fed.Cir.1985); Prodyne Enterprises, Inc. v. Julie Pomerantz, Inc., 743 F.2d 1581, 1583 (Fed.Cir.1984); Molinaro v. Fannon/Courier Corp., 745 F.2d 651, 654 (Fed.Cir.1984).

Thus, the Federal Circuit has advised: "[w]here no issue of material fact is present ... courts should not hesitate to avoid an unnecessary trial by proceeding under Fed.R.Civ.P. 56 without regard to the particular type of suit involved." Chore-Time Equip. ., Inc. v. Cumberland Corp., 713 F.2d 774, 778-79

(Fed.Cir.1983).

"In accordance with *Chore-Time,* it is incumbent on the trial judge to look beyond mere denials or arguments with respect to issues of scope and content of the prior art, differences between the prior art and the invention in suit, level of skill in the art or other factual issues." Union Carbide Corp. v. American Can Co., 724 F.2d 1567, 1571 (Fed.Cir.1984).

The Court considers the current summary judgment motions with these tenets in mind.

III. A Patent Action

A. Jurisdiction

Since 1836, the federal courts have had exclusive subject-matter jurisdiction over all cases arising under the patent laws. *See* 28 U.S.C. s. 1338(a).

B. Presumption of Validity

The Court's analysis proceeds under the presumption of a patent's validity. *See* 35 U.S.C. s. 282. Each claim of a patent is presumed valid independent of the validity of the patent's other claims. *See id*. This presumption of validity is never destroyed. *See* Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530 (Fed.Cir.1983). The burden on the party challenging validity is to show, by clear and convincing evidence, that the patent is invalid. *See* Hybritech, Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367 (Fed.Cir.1987), *cert. denied,* 480 U.S. 947, 107 S.Ct. 1606, 94 L.Ed.2d 792 (1987). In a patent infringement suit such as the instant case, the alleged infringer Sears challenges the patent's validity as a defense. The Court must decide whether the Sears has sustained its burden in proving the patent invalid.FN4

FN4. If the alleged infringer fails to prove the patent invalid, the court may conclude only that the patent has not been proven invalid and need not conclude that the patent is valid, because the patent is presumed valid. *See* Stratoflex, 713 F.2d at 1534.

There are two ways to establish that a patent is invalid: (1) prove that the patented invention does not meet one or more of the conditions of patentability, or (2) prove that the inventor did not satisfy one or more of the requirements of patentability.

In the current case, Sears' counterclaim alleging invalidity of Claims 1-4, 7-11, and 13 of the '865 patent is premised on the first ground for invalidity- that the '865 patent failed to meet the conditions of patentability set forth in 35 U.S.C. s.s. 102 and 103. (*See* Counterclaim para. 7.) Sears' position is based on a straightforward reading of the patent's claims, Levinson's own admissions during his deposition, and Sears' own prior art search efforts which produced a number of prior art references not considered by the PTO during examination of Levinson's patent application which resulted in issuance of the '865 patent. (*See* Def.'s Br. at 1.) More specifically, Sears argues that prior art references "teach every feature or element of claims 1-4, 7-11, and 13 of the '865 patent either individually or in combinations of no more than two references. Thus, claims 1-4, 7-11, and 13 are invalid as being anticipated under 35 U.S.C. s. 102(b) and/or obvious under 35 U.S.C. s. 103(a)." (*Id*. at 2.) Although Claims 1-4, 7-11 and 13 are at issue, the Court need only consider independent Claims 1 and 13 since the parties do not here argue that the dependent claims are separately patentable. *See infra* note 6.

Although courts are not bound by the Patent and Trademark Office ("PTO") of the Department of Commerce's decision to issue a patent, the PTO is due the deference given a qualified government agency that is presumed to have properly done its job. *See* American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1359 (Fed.Cir.), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984). Therefore, if a challenger comes forward with no evidence different from that reviewed by the examiner who considered the patent application, the challenger's task is difficult. *See id.* The challenger's task should be less difficult if the challenger presents material evidence that was not considered during the PTO application process. *See* id. at 1359-60. The burden of proof, however, is not lessened. *See* Gillette Co. v. S.C. Johnson & Son, Inc., 919 F.2d 720, 723 (Fed.Cir.1990).

IV. Invalidity by Anticipation: 35 U.S.C. s. 102(b)

A product is not patentable unless it is new. Determining whether a product is "new" within the meaning of the patent statute requires comparing the products with the products of the relevant prior art. *See* Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 619 (Fed.Cir.), *cert. dismissed,* 474 U.S. 976, 106 S.Ct. 340, 88 L.Ed.2d 326 (1985). If a single piece of relevant prior art contains all the elements of the patent at issue, the prior art is said to have anticipated the patent. *See* Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 715-16 (Fed.Cir.1984).

Under 35 U.S.C. s. 102(b), a patent is invalid if the claimed invention:

was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

Courts have interpreted s. 102(b) to require that "each and every element as set forth in the claim [be] found, either expressly or inherently described, in a single prior art reference." Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1570 (Fed.Cir.), *cert. denied,* 488 U.S. 892, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988); *see also* Minnesota Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 1565 (Fed.Cir.1992).

To determine whether a patent is anticipated by prior art under s. 102(b), the Court must undertake a three-step analysis. The first step is construction of the patent claims to determine their meaning in light of the specification and prosecution history. The second step requires the Court to compare the properly construed claims with the subject matter described in the prior art reference and identify corresponding elements disclosed in the allegedly anticipating reference. *See* Titanium Metals Corp. of Am. v. Banner, 778 F.2d 775, 782 (Fed.Cir.1985). The third step requires the Court to determine whether the prior art reference is enabling, thereby placing the allegedly disclosed matter in the public's possession. *See* Akzo N.V. v. United States Int'l Trade Comm'n, 808 F.2d 1471, 1479 (Fed.Cir.1986), *cert. denied,* 482 U.S. 909, 107 S.Ct. 2490, 96 L.Ed.2d 382 (1987). Accordingly, a prior art reference in a printed publication cannot anticipate an invention under s. 102(b) unless it enables one skilled in the art to produce the invention described in the patent.

Defendant must prove anticipation by clear and convincing evidence. *See* Texas Instruments Inc. v. United States Int'l Trade Comm'n, 988 F.2d 1165, 1177 (Fed.Cir.1993) ("A patent is presumed valid and the party asserting invalidity must overcome this presumption by clear and convincing evidence establishing the facts which support the conclusion of invalidity.") (citing Intel Corp. v. United States Int'l Trade Comm'n, 946

F.2d 821, 834 (Fed.Cir.1991)); *see also* Dennison Mfg., Co. v. Panduit Corp., 475 U.S. 809, 810, 106 S.Ct. 1578, 89 L.Ed.2d 817 (1986).

A. Claim Construction

U.S. Patent Number 5,094,865 was issued by the Patent Office on March 10, 1992. As set forth above, it is described as a "Two Stage Process for Cooking/Browning/ Crusting Food by Microwave Energy and Infrared Energy." The "Abstract" section of the '865 patent recites:

A two-stage process for baking/crusting food products is proposed. The First Stage is carried out in a microwave oven chamber; the Second Stage is carried out beneath a gas or electric broiler. In both stages, the food is placed on a browning/crusting device which provides a metal cooking surface, heated by adherent microwave lossy materials or on a smooth surface of one or more blocks of microwave lossy ceramic or microwave lossy igneous rock which is supported in a metal tray. In the First Stage, a First Stage kit includes a microwave transparent cover, a microwave transparent thermal insulating support and the browning/crusting device. In the Second Stage, only the browning/crusting device is used to complete the overall process. The browning/crusting device is pre-heated in a microwave oven to achieve an elevated browning/crusting temperature before applying food to the browning/crusting device.

(Def.'s Exh. 2 "Abstract".)

The validity issue addresses Claims 1, 3, 4, 7, and 13 of the '865 patent. Claim 1 provides as follows:

1. A method for browning/crusting food, in two stages, comprising:

in a first stage: placing a microwave-lossy browning/crusting device in a microwave chamber, said browning/crusting device including a food contacting surface on a non-metal, thermal insulating tray supporting said browning/crusting device; said browning/crusting device further being resistant to heat damage when exposed to infrared energy from an infrared broiler; said browning/crusting device being at least in part microwave-lossy; exposing said browning/crusting device to microwaves until said food contacting surface is heated to a food browning/crusting temperature; placing said food to be browned/crusted on said food contacting surface to brown/crust said food in contact with said food contacting surface; and

in a second stage: exposing said browning/crusting device and said food to infrared energy by placing said browning/crusting device, with said food on said food contacting surface, beneath an infrared broiler whereby a surface of said food, opposed to said food contacting surface, is browned/crusted by said infrared energy from said broiler.

(Defs.' Exh. 2 at col. 7, line 58 to col. 8, line 13.)

In lay terms, the first stage of Claim 1 discloses a method of preheating a microwave browning dish in a microwave oven and placing food in the preheated browning dish to brown the portion of the food that comes into contact with the browning dish (not unlike browning in a hot skillet). (*See* Def.'s Br. at 4.) More specifically, the first stage can be broken down into three separate steps: (a) placing a microwave browning dish that is part microwave-lossy and which will resist heat imposed by an infrared broiler, into a microwave oven, (b) preheating the microwave browning dish by heating the dish with microwave energy

until the dish is hot or reaches the food browning/crusting temperature; and (c) placing the food on a dish. (*See* id. at 6.) The second stage of Claim 1 discloses a method of placing the browning dish and food under an infrared broiler FN5 to brown the top surface of the food. (*See* id. at 4; *see also* Plf.'s Reply at D2.)

FN5. An infrared broiler is a heating device that cooks using heat that is radiated from the broiler to the food item. Electric ovens, gas ovens, and microwave ovens commonly utilize infrared broilers. (*See* Def.'s Br. at 5 n. 3.)

Claim 13 is identical to Claim 1 with the exception of the requirement that the food contacting surface need not be made of metal.FN6 Claim 13 provides:

FN6. With the exception of Claim 13, the Court reads the express language of the '865 patent as rendering all remaining claims at issue in the current case dependent upon Claim 1, whether directly or indirectly. Claims 2-4, 7-11 provide, respectively:

2. The method of claim 1 wherein said browning/crusting device retains an elevated temperature, above room temperature, subsequent to said second stage, and functions as a heated serving platter for said food.

3. The method of claim 1 wherein said infrared broiler is in said microwave chamber.

4. The method of claim 1 wherein said browning/crusting device includes a metal plate which has a metal food contacting surface and has a microwave-lossy composition in contact with the opposite surface of said metal plate.

7. The method of claim 1 wherein said food is cooked by exposure to microwave energy, in said microwave chamber, on said browning/crusting device subsequent to said first stage browning/crusting device and prior said second stage browning/crusting.

8. The method of claim 1 wherein said infrared broiler is preheated while said food is browning/crusting on said food contacting surface within said microwave chamber during said first stage.

9. The method of claim 1 wherein said food is browned/crusted in a metal pan having a bottom surface that contacts the food contacting surface of the browning/crusting device.

10. The method of claim 9 wherein said food is bread and, during said first stage, bread dough is baked in said metal pan having a bottom surface in contact with said food contacting surface and, during said second stage, said baked bread is browned/crusted in said metal pan beneath said infrared broiler.

11. The method of claim 9 wherein said food is cake and, during said first stage, a cake batter is baked in

said metal pan having a bottom surface in contact with said food contacting surface and, during said second stage, said baked cake is browned/crusted in said metal pan beneath said infrared broiler. (Def.'s Exh. 2 at col. 8, lines 14-64.)

13. A method for browning/crusting food, in two stages, comprising:

in a first stage: placing a microwave-lossy browning/crusting device in a microwave chamber, said browning/crusting device including a metal plate having a metal food contacting surface and a microwave-lossy non-metallic mass engaged with said metal plate on its opposite surface; placing said browning/crusting device on a non-metal, thermal insulating tray supporting said browning/crusting device; said browning/crusting device further being resistant to heat damage when exposed to infrared energy from an infrared broiler; exposing said browning/crusting device to microwave until said food contacting surface is heated to a food browning/crusting temperature; placing said food to be browned/crusted on said food contacting surface to brown/crust said food in contact with said food contacting surface; and

in a second stage: exposing said browning/crusting device and said food to infrared energy by placing said browning/crusting device, with said food on said metal contacting surface, beneath an infrared broiler whereby a surface of said food, opposed to said metal food contacting surface, is browned/crusted by said infrared energy from said broiler.

(Defs.' Exh. 2 at col. 9, line 1 to col. 10, line 13.)

B. Comparison of Properly Construed Claims with the Subject Matter Described in the Prior Art References

Sears' invalidity claim is bottomed on the theory that the '865 patent was anticipated by several patent applications published more than one year prior to the filing date of the '865 patent application. As set forth above, in order for an invention to be novel under s. 102(b), the invention cannot be described in a printed publication that was available to the public more than one year prior to the filing date of the patent application. Levinson filed his patent application on February 18, 1991. Under s. 102(b), any printed publication in the form of a patent or other publication such as a textbook, brochure or cookbook dated prior to February 18, 1990 is prior art.

Sears maintains that efforts to solve the browning problem FN7 have been available well before February 18, 1990, including combination microwave/broiler ovens (including Levinson's own U.S. Patent Number 3,731,037), microwave browning dishes, and cookbooks that taught cooking methods utilizing both microwave energy and infrared broilers. (*See* Def.'s Br. at 7.) Indeed, Whirlpool, the manufacturer of the allegedly infringing appliance in the current case, published a cooking brochure in 1983 addressing these cooking methods. (*See* id. at 9.) Sears maintains that more relevant prior art existed at the time of the search and the PTO Examiner failed to consider these prior art references during the prosecution of Levinson's '865 patent application.FN8 (*See* id. at 8.)

FN7. Microwave ovens have a limited browning capacity. Microwave energy's inability to brown the exterior of food under normal conditions is a primary disadvantage associated with this appliance. Microwaves penetrate the food's surface, cooking the inside of food at the same time the exterior of food is cooked. Consequently, the food's exterior is not usually exposed to a sufficient amount of heat over a sufficient amount of time to attain a brown or golden-brown color. In contrast, broiling or baking with infrared heat results in radiated heat directed toward the outside of the food, which is cooked first and longest, resulting in a browned exterior at the time the inside of the food is cooked. Browning is desired as it improves the food's appearance and taste. (*See* Def .'s Br. at 3-4.)

FN8. For example, Sears argues that the Examiner (1) failed to recover several patents directed toward microwave browning dishes; (2) failed to recover a number of prior art references that teach and suggest a combination of a microwave oven and either a broiling or a convection heating apparatus; and (3) failed to recover four of Levinson's own patents that the plaintiff briefly referred to in his patent application-the '027 patent, in addition to U.S. Patent Numbers 3,701,872, 3,777,099, and 3,731,037 (the " '872, '099, and '037 patents," respectively)-which disclose the combination of the preheating of a microwave browning dish, the placing of food on the preheated dish, and then infrared cooking of the food. (*See* Def.'s Br. at 11-12.)

Further, Sears maintains that Levinson breached his duty of disclosure by failing to supply copies of these patents to the Examiner as mandated by 37 C.F.R. s. 1.97 or 1.98. (*See id*. at 13 .) Sears contends that the '865 patent's claims would not have been allowed to issue had Levinson brought these references to the Examiner's attention. (*See* id. at 16.) In addition, the Examiner did not list these patents on a form 1440, nor did the PTO list these patents on the face of the '865 patent. (*See* id. at 13.)

Levinson maintains that he never filed an Information Disclosure Statement during the prosecution of the patent application because he "could not then and still cannot find under [ ] s. 102 a teaching in one patent or under [ ] s. 103 a suggestion or incentive in two documents that would anticipate his novel method." (Plf. Reply at D4.)

The PTO Examiner, George Yeung, conducted a prior art search based on the contents of Levinson's February 18, 1991 application and the claims therein. That search resulted in three prior art references.FN9 (*See* Def.'s Br. at 5.) The Examiner ultimately determined to his satisfaction that claims 1-11 were "free of the prior art." (Plf.s' Reply Exh. D at 4.) However, Sears contends that the Examiner performed an inferior search and an inferior examination because of the popularity of the '865 patent's two-stage cooking process.

FN9. Specifically, the "References Cited" section of the '865 patent lists U.S. Patent No. 4,486,640 ("Bowen"); U.S. Patent No. 4,917,907 ("Kwis"); and British Patent Application No. 2 196 231 ("the 231 Application"). (*See* Def.'s Br. at 5.)

Examiner Yeung stated: "The Bowen et al patent is cited to show a cooker/backer utensil for microwave oven. The Kwis et al patent is cited to show a method of baking and browning an uncooked bottom crust dough of a pie. The U.K. Patent Application is cited to show a method of reheating frozen filled cooked dough product." (Def.Exh. 2.)

Sears contends that only Bowen discloses a browning dish which includes a metal tray. A plastic layer that includes a ferrite material that absorbs microwave energy, *i.e.,* a "lossy," coats the tray's underside. (*See* id. at 10-11.) Further, neither Kwis nor the 231 Application disclose use of a combination microwave-broiler oven. Kwis is directed toward a pre-fabricated pie supplied inside a tray fabricated from a microwave-interactive board material. This patent also discloses that a conventional oven may brown the top crust. The 231 Application discloses a method of reheating a frozen pie that includes heating the pie in a microwave and then heating it in a conventional oven to cook and firm the crust. (*See* Def.'s Br. at 11.)

The Court notes that an invention is construed not only in light of the claims, but also with reference to the prosecution history in the PTO. *See* Graham v. John Deere Co., 383 U.S. 1, 33, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966). During the prosecution of the application of the '865 patent, Levinson amended his patent

application-at the direction of the Examiner, he submitted replacement drawings in conformity with the PTO's requirements-and rewrote Claims 1, 2, 4, 6 and added new Claims 12 and 13. (*See* Def.'s Exh. 2.) FN10

FN10. Sears sets forth that the Examiner made only minor amendments to the claims and allowed claims of substantially the same scope as those filed in the application. And the Examiner failed to provide a "reasons for allowance" as required when a patent application is allowed. (*See* Def.'s Br. at 14 (referencing, in part, 37 C.F.R. s. 1.109).)

However, the Court notes that the Examiner is not mandated to set forth his "reasons for allowance" of the patent, as set forth expressly in 37 C.F.R. s. 1.109 ("If the examiner believes that the record of the prosecution as a whole does not make clear his or her reasons for allowing a claim or claims, the examiner may set forth such reasoning."). Further, Examiner Yeung filed a "Notice of Allowability" deeming the drawing filed by Levinson on November 6, 1991 to be acceptable. (*See* Def. Exh. 2.)
Returning to Sears' contention that the Examiner conducted an inferior examination, the defendant offers two anticipating references to support its argument: (1) Levinson's U.S. Patent Number 3,881,027 ("the '027 patent") issued in 1975, and (2) the aforementioned Whirlpool brochure published in 1983.FN11 (*See* Def.'s Br. at 23.) Sears maintains that these prior art references teach and establish the methods set forth in claims 1-4, 7-11, and 13 of the '865 patent and that such methods were in the public's possession as of February 18, 1990. (*See* id.)

FN11. Sears maintains that other possible anticipating references include U.S. Patent Number 4,771,154 ("the Bell Patent"), the cookbook entitled *Richard Deacon's Microwave Cookery,* and Levinson's own U.S. Patent Number 3,731,037 ("the '037 patent). (*See* Def.'s Br. at 23 n. 6.)

Sears extensively sets forth sentences or clauses in the '865 patent allegedly corresponding with the contents of the '027 patent and the Whirlpool brochure. (*See* id. at 23-28 (chart).)

Sears offers the expert report of Donovan J. Fandre in support of its invalidity argument; Fandre has "extensive experience with conventional and microwave cooking" and proffers himself as a "microwave cooking expert." (Def.'s Exh. 34 at 1, 6.) Levinson relies on his own expertise and the expertise of his patent expert, Harry B. Keck, Esq.FN12 (Plf.'s Br. at 5.) Fandre is of the opinion that each element of the '865 patent was disclosed by either the Whirlpool brochure or the '027 patent, individually, FN13 "or in combination with the general knowledge that was available to those skilled in the art of microwave cooking as of February 18, 1990." (Def.'s Exh. 34 at 8.)

FN12. Levinson provides Keck's extensive credentials. (*See* Plf.'s Br. Exh. D.)

FN13. Fandre also sets forth that the cookbook authored by Richard Deacon and entitled "Richard Deacon's Microwave Cookery," published in May of 1997 individually discloses the '865 patent. However, Sears' arguments rely upon and analyze the '027 patent and the Whirlpool brochure, as discussed infra.

Addressing the '027 patent specifically, Sears contends that the '027 patent completely teaches the '865 patent as the former allegedly discloses both the apparatus and the method of the claims of the '865 patent,

thus rendering those claims invalid under s. 102(b). (*See* Def.'s Reply at 5.)

Fandre provides "claim charts" similar to those set forth in Sears' pleadings (*see* Def.'s Br. at 22-28 (charts)) indicating where each feature of each claim of the '865 patent may be found in either the '027 patent or the Whirlpool brochure.FN14 (*See* Def .'s Exh. 34 at 8-22 (charts).) The Court notes that Fandre often found the '865 patent's features in the prior art on the basis that he "was familiar with" or "well aware of" or "recall[ed]" that feature in microwave ovens, browning dishes, etc. (*See* id. at, *e.g.,* 8-10, 15, 17.) The Court emphasizes that the finding of some features of a patent claim in the prior art are not uncommon; advances in inventions are due, in large part, to "building off of" an earlier invention. See infra text at 45-46.

FN14. Fandre also creates such a chart for the Deacon cookbook. *See supra* note 11.

Significantly, Fandre recognized the failure to find each feature of each claim of the '865 patent in the prior art available as of February 18, 1990. Fandre reasons that the feature not found in the '865 patent was already known prior to 1990. (*See* id. at 14, 19.) However, Fandre has failed to substantiate these conclusory statements. And as set forth above and reiterated herein, courts have interpreted s. 102(b) to require that "each and every element as set forth in the claim [be] found, either expressly or inherently described, in a single prior art reference." *See supra* text at 14. Accordingly, Fandre's report does not support a finding of anticipation under s. 102(b).

Levinson distinguishes the '027 patent, in part, on the basis of apparatus, arguing that the '027 patent concerns baking not with a conventional gas or electric broiler as in the '865 patent, but with a microwave powered baking oven chamber "which can be an integral or removable member of a microwave oven" and which surrounds and heats all sides of a food in the same manner as a conventional baking oven. (*See* Plf.'s Reply at C7 (quoting Def.'s Exh. 16 col. 1, lines 57-58).) However, Sears points out that none of the claims of the '865 patent specifically identify a conventional gas or electric broiler.

In response, Levinson distinguishes the patent at issue on the basis of methodology, testifying that an object of the '865 patent is to " 'provide improved ways to combine microwave oven cooking with cooking under a broiler of a conventional gas or an electric kitchen range.' Well, my God, you don't have that in the '027 ... This is the object of the '865." (*See* Plf. Dep. at 425:8-14 (quoting '865 patent Claim 1).) And although Levinson demonstrated his patent with a convection oven, *see infra* note 17, the terms of the '865 patent instruct use of a unidirectional conventional gas or electric broiler for baking,FN15 and, thus, browning of a specific surface of the food- namely the top-is achieved. (*See* Def. Exh. 18, col. 7, lines 16-21.) In contrast, the '027 patent implements a microwave powered baking oven chamber which, like a conventional baking oven, surrounds and heats all sides of a food.FN16

FN15. The Court notes that once a patentee has argued a narrow construction of his claims before the Patent Office, he should be precluded from arguing a broader construction for the purpose of alleging infringement. *See* Coleco Industries, Inc. v. United States Int'l Trade Comm'n, 65 C.C.P.A. 105, 573 F.2d 1247, 1257 (C.C.P.A.1978). Sears accuses Levinson of seeking to both narrow the claims to preserve the validity of the '865 patent, while later interpreting the claims broadly so as to encompass an accused device under a claim of infringement. (*See* Def.'s Reply at 7.)

FN16. Despite Levinson's assertions to the contrary, Sears contends that the '027 patent is directed not to

just baking, but also to broiling; the '027 patent states that "this invention provides a method of cooking in a microwave oven to fry, bake, broil, brown and barbecue." (Def.'s Exh. 16 col. 1, lines 14-15.) As set forth above, the '865 patent applies to broiling and browning.

The Court recognizes that the baking methods set forth in the '027 and the '865 patents are markedly different. Although the claims of the patent at issue do not contain an express reference to the use of gas or electric broilers, the "Abstract" portion of the '865 patent expressly sets forth that the Second Stage is carried out beneath a gas or electric broiler, *see* supra text at 16, and the devices are set forth in an "object" of the invention, *see* infra text at 30-31.

Levinson maintains that the '865 patent concerns an infrared broiler that browns and crusts only the top surface of food at the Second Stage. Sears argues that Claim 1 of the '865 patent does not contain such limiting language prohibiting browning of any other surfaces of the food so long as the top surface is browned.FN17

FN17. Although outside the scope of the claims, Sears notes that Levinson testified that he demonstrated the '865 patent's method using a microwave and a convection oven. The latter arrangement exposes the food from all sides rather than from one direction. (*See* Plf. Dep. at 154:21-155:18.)

Concededly, the "Prior Art" portion of the '865 patent sets forth that "the Second Stage of browning/crusting is carried out on the *upper surface* of the food with infrared energy from an infrared broiler." (Def.'s Exh. 2, col. 5, lines 45-47 (emphasis added).) The Court recognizes that the claims of a patent provide the concise formal definition of an invention. It is to these wordings that the Court must look to determine whether there has been an infringement. *See* Autogiro Co. of America v. United States, 384 F.2d 391, 396-87 (Ct.Cl.1967). But in interpreting the meaning of a patent claim, courts are not confined to the language of the claim. *See* id. at 398. At this juncture, the Court's focus is the issue of validity and not of infringement. Accordingly, the Court may look outside the claims to interpret the patent at issue. As set forth above, the '865 patent at the Second Stage expressly targets the top surface of a food. Further, the First Stage browns the under-surface of the food while the remainder of the food is cooked by microwave energy. (*See* Def. Exh. 18, col. 4, lines 65-68; col. 5, lines 1-4.)

Next, although Levinson asserts that the '027 patent does not teach the two-step operation at issue (*see* Plf.'s Reply at C7), Sears contends that the '865 patent is allegedly disclosed when the '027 patent recites:

In a second representative example of operation, either with or without empty container 7 as desired, microwave kiln 1 is heated to a predetermined temperature without foodstuff 6 in work chamber 2. At the predetermined temperature, say 500 (deg.)F. (generally hotter than would be proper for gas or electric ovens because microwaves speed, in deep cooking and defrosting, leaves less time for surface browning) foodstuff 6 is introduced into hot work chamber 2. If empty container 7 was included in the preheating and it is of sufficient mass, foodstuff 6 is seared when it first contacts hot container 7, and thenceforth, microwave energy and heat energy stored in lining 4 finishes the cooking and browning.

(Id. at col. 4, lines 11-24.) In lay terms, the '027 patent sets forth the steps found in the '865 patent of preheating the metal container, searing the food on the preheated metal container, and then browning the food with infrared energy.

The Court finds this description accurate but, nonetheless, an improper simplification of the device and methodology of the '865 patent. Noticeably absent from the '027 patent is the presence of the microwave-lossy browning/crusting device claimed in the '865 patent. Further, the ceiling, floor and walls of a unique oven chamber placed within a microwave oven are microwave lossy in the '027 patent. In contrast, this unique baking oven chamber is not present in the '865 patent; a browning/crusting device is used. (*See* Plf. Dep. at 419:23-25.) Therefore, it is argued that the '027 and '865 patents are "unlike in structure, function and result ." (Plf.'s Reply at C7.)

Sears counters that the claims of the '865 patent are not specific as to the microwave-lossy browning/crusting device but rather only identify this device as "including a food contacting surface" that is "resistant to heat damage when exposed to infrared energy from an infrared broiler" and "being at least in part microwave lossy." FN18 (Def.'s Reply at 8 (quoting Def.'s Exh. 2, col. 7, lines 62-68).) As for Levinson's attempt to distinguish the '027 patent on the basis that the baking oven chamber is not present in the '865 patent, Sears argues that the '865 patent's claims do not preclude such an arrangement and "do not further distinguish over such an arrangement." (Def.'s Reply at 9.) Further, both the roof and floor of the lining could be made from microwave lossy material. (*See* Def.'s Br. at 17 (citing Exh. 16, col. 2, lines 22-25;60-61).)

FN18. Sears characterizes several of the '865 patent's claims as follows. Claim 2 merely identifies that this device "retains an elevated temperature, above room temperature, subsequent to the second stage." Claim 4 further identifies that the device "includes a metal plate which has a metal food contacting surface and has a microwave-lossy composition in contact with the opposite surface." Claim 13 defines the device as including a metal plate having a metal food contacting surface and a microwave-lossy non-metallic mass engaged with said metal on its opposite surface" and the "device further being resistant to heat damage when exposed to infrared energy from an infrared broiler." (Def.'s Reply at 8.)

Again, the Court is not persuaded by Sears' arguments. As set forth *supra,* the devices used in the '865 patent are different from those found in the '027 patent. And more significantly, the '865 patent's method for providing sequential microwave and infrared energy is distinguished from the '027 patent. The '865 patent's objectives maintain that the methods, and not the devices, are specific to the patent. The '865 patent provides:

It is an object of this invention to provide improved ways to combine microwave oven cooking with cooking under the broiler of a conventional gas or electric kitchen range.

It is another object of this invention to provide improved ways to boil, crust, fry, sear, and toast by combining sequential microwave energy and infrared energy cooking.

It is another object of this invention to provide new methods for combining sequential microwave energy and infrared energy cooking of foods such as baking pizza pies; cooking hot dogs and toasting hot dog rolls ....

(Def.'s Exh. 2, col 1., lines 59-63; col. 2, lines 1-8.) The '027 patent's objects are as set forth as follows:

One object of this invention is to provide a method for a microwave oven which will fry, bake, broil, brown

and/or barbecue food.

Another object of this invention is to provide a new method of combining an infra red oven and a microwave oven.

Another object of this invention is to describe methods of cooking meat in metal containers in a microwave oven to provide rare and medium rare cooked portions.

(Def.'s Exh. 16, col. 1, lines 44-53.) Accordingly, in the current case, a finding of anticipation under 28 U.S.C. s. 102(b) must ultimately be based upon the '865 patent's improved and novel methods, in addition to its devices.

Significantly, the '027 patent was considered by the Examiner. Sears argues that this is "legally incorrect" as the '027 patent was not listed under the "References Cited" heading of the patent. However, the Court notes that the '865 patent expressly sets forth in the "Description of Prior Art" section that the '027 patent "disclose[s] a microwave oven apparatus, with heating layers on the ceiling, floor and walls of the microwave chamber, and describe[s] cooking food in a metal container in that microwave chamber." (Def.'s Exh. 18, col. 1, lines 35-38.) Sears takes issue with the absence of any indication in the '865 patent that the Examiner considered the text at column 4 of the '027 patent, *see supra* text at 28-29, because Levinson failed to call this portion of the patent to the Examiner's attention. (*See* Def.'s Reply at 10.)

Nevertheless, the Examiner examined the '027 patent. The Court finds irrelevant the inquiry of whether the '027 patent was brought to the Examiner's attention by or independent of Levinson. Indeed, the Examiner referenced the '027 patent in the '865 patent, gleaned what was relevant, and presumably found no reason to further expound on the '027 patent. FN19 The mandate that a patent is presumed valid guides this Court. Accordingly, because the Examiner determines whether to grant a patent application, the Court logically presumes the Examiner to be competent. *See supra* text at 13. In the current case, the Court finds no basis upon which to conclude otherwise. This conclusion is supported by the Examiner's apparent thoroughness in processing the '865 patent application. Levinson's application was filed with 11 claims, which the Examiner indicated were "free of the prior art" but rejected under 35 U.S.C. s. 112 as being indefinite. *See supra* text at 22. In response to this first PTO action, Levinson filed an amendment amending Claims 1, 2, 4, and 6 to address the s. 112 rejection and added claims 12 and 13. In response to the amendment, the Examiner allowed the case. *See supra* note 10; Plf.'s Reply at D3.

FN19. The PTO examiner also referenced patents '806; '704; '234; '872; '099; '037; '133; '967; '815. (*See* Exh. 18, col. 1, lines 16-17, 20, 32, 35, 39-40; col 4, line 55.)

In light of the foregoing, the Court finds that the '027 patent does not contain all the elements of the '865 patent as the '865 patent's methodology proposes new and improved methods of combining microwave cooking with infrared energy. Indeed, the devices used in the '865 patent are not the essence of the invention. In response to the question of whether there was anything new in 1991 about having a browning dish on a thermal insulating tray, Levinson testified: "No, I'm using all old parts. This is a new way (method) to use old parts. This is a method of using parts that were established ...." (Plf. Reply at D11 (quoting Plf. Dep. at 323:9-11.) Levinson testified that "[e]verything was in the prior art, the apparatus. All I did was put it together and use it in a new, novel way .... [W]hen we added by putting the infrared broiler inside the microwave chamber, *it gave you slightly different results because you had different preheat times*

and different power levels available." (Plf. Dep. at 324:4-8 (emphasis added).) The intense heat of an oven broiler as taught in the '865 patent differs from the even, relatively gentle heat of a conventional oven as taught in the prior art. (*See* Plf.'s Reply at C11.) In sum, in light of this new methodology, the '027 patent cannot be said to have anticipated the patent at issue under the requirements of s. 102(b).

As for the second anticipating prior art reference offered by the defendant, Sears concludes that "it is clearly established above that [the '865 patent' s] features were within the knowledge of those of ordinary skill in the art prior to 1990-including [ ] Levinson, as evident from his deposition testimony." Yet Sears acknowledges that "the Whirlpool brochure does not explicitly specify minor elements of claims 1 and 13, such as the thermal insulating tray or metal surface." (Id. at 29 (referencing Plf. Dep. at 339, 350, 375, 377) (Levinson testified to an awareness of several patents utilizing insulating trays, metal cooking surfaces, and browning dishes).) Sears posits that, in essence, microwave oven and cookware manufacturers and microwave cookbook authors were addressing the microwave oven's inability to brown the exterior of food as of February 18, 1990. Further, the prior art recognized the need for a microwave browning device capable of withstanding high temperatures. (*See* Def.'s Br. at 10 (citing several patents).)

The Whirlpool brochure, entitled "Nice things to know about microwave ovens," appears to be published by Appliance Information Service and is organized in three sections: (1) how microwave ovens cook; (2) principles of microwave cooking; and (3) how to select utensils for microwave cooking. Addressing the latter section, the brochure directs that metal pans and containers are not "good" utensils for microwave cooking. (*See* Def.'s Exh. 12 at S917.)

Levinson argues that the brochure's instruction "expressly teaches away from plaintiff's claimed invention." (Plf.'s Reply at C7.) Levinson also maintains that the glass-ceramic dish described in the brochure differs from his browning/crusting devices in structure, function and result. (*See* id. at C8.) However, Sears draws a distinction between microwave "cooking" and microwave "browning," noting that "there is no prohibition in this brochure against using a browning dish which contains metal therein for use in browning food within a microwave oven." Any available browning dish can be utilized. Further, Claims 1-3, 7 and 8 of the '865 patent do not require that the browning/crusting device have any metal. (Def.'s Reply at 10-11.)

Levinson also advances that "Claim 13 clearly recites the use of the *same metal pan* in *both* cooking stages." Thereby, the Whirlpool brochure's author did not possess Levinson's invention. (Plf.'s Reply at C8 (emphasis in the original).) Sears, however, contends that the brochure specifically teaches the use of a browning dish to brown the bottom of a food item and use of a broiler to brown the top of a food item. (*See* Def.'s Reply at 11 .)

The Court finds that the brochure is rather general in terms of content and instruction; the publication's purpose appears to be to provide guidance to the "everyman" microwave user. Indeed, the brochure's title suggests this objective. However, Sears extrapolates the brochure's rather overarching directives regarding browning as extending to the use of browning dishes containing metal. The Court cannot read the brochure as either suggesting or advising against this application. Accordingly, the Court finds that the Whirlpool brochure does not enable one skilled in the art to produce the invention described in the '865 patent. And, significantly, Sears expressly recognizes that this second anticipating prior art reference does not contain all the elements of the patent at issue. *See supra*. Thus, under s. 102(b), the Whirlpool brochure cannot be found to have anticipated the '865 patent.

C. The '027 Patent **and the Whirlpool Brochure Are Not Enabling**

In sum, Sears has failed to prove by clear and convincing evidence anticipation of the '865 patent by prior art. As set forth above, neither the '027 patent nor the Whirlpool brochure could enable an individual skilled in the art to produce the invention described in the '865 patent. In other words, these prior art references could not have placed the invention disclosed in the '865 patent in the public's possession. Accordingly, the Court finds the '865 patent valid under a s. 102(b) analysis.

V. Invalidity by Obviousness: 35 U.S.C. s. 103(a)

Turning to the obviousness determination in the patent validity analysis, s. 103(a) provides in part that a patent may not be obtained "though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. s. 103(a) (West Supp.1998).

This Court has set forth four factual inquiries relevant to the question of obviousness as follows: (1) the level of skill in the art; (2) the scope and content of the prior art; (3) the difference between the prior art and the claimed subject matter as a whole; and (4) objective indicia of nonobviousness, such as commercial success, long felt but unsolved needs, the failure of others to meet those needs, etc. *See* Syntex Pharm. Int'l, Ltd. v. K-Line Pharm. Int'l, Ltd., 721 F.Supp. 653, 658 (D.N.J.1989) (Wolin, J.) (citing Graham v. John Deere Co., 383 U.S. 1, 17-18, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966); Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1566 (Fed.Cir.), *cert. denied,* 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987)), *appeal dismissed,* 905 F.2d 1525 (1990). In determining obviousness, the invention must be considered as a whole; small differences between the claims and the prior art can therefore give rise to patentability. *See id.* (citing Jones v. Hardy, 727 F.2d 1524, 1529 (Fed.Cir.1984). A combination of prior art features will only be deemed obvious if the prior art references contain a suggestion for so combining their teachings; the hindsight afforded by the invention cannot be used to negate its insight. *See id.* (citing In re Fine, 837 F.2d 1071, 1075 (Fed.Cir.1988); Panduit, 810 F.2d at 1568; ACS Hospital Sys., Inc. v. Montefiore Hospital, 732 F.2d 1572, 1577 (Fed.Cir.1984)). In other words, an individual must "forget what he or she has been taught ... about the claimed invention and cast the mind back to the time the invention was made ... to occupy the mind of one skilled in the art who is presented only with the [prior art] references." *Id.* (quoting W.L. Gore & Assocs. v. Garlock, Inc., 721 F.2d 1540, 1553 (Fed.Cir.1983), *cert. denied,* 469 U.S. 851, 105 S.Ct. 172, 83 L.Ed.2d 107 (1984)).

As set forth prior and reiterated herein, the '865 patent, having been issued by the PTO, enjoys a statutory presumption of validity under 35 U.S.C. s. 282, which may be overcome only by clear and convincing evidence of the obviousness of the claimed subject matter. *See id.* (citing Hughes Tool Co. v. Dresser Indus., Inc., 816 F.2d 1549, 1555 (Fed.Cir.), *cert. denied,* 484 U.S. 914, 108 S.Ct. 261, 98 L.Ed.2d 219 (1987) (other citation omitted)). The introduction of prior art more pertinent than that considered by the Examiner, however, weakens the presumption of validity and eases the burden of proof on the party seeking to have the patent declared invalid. *See id.* (citations omitted). On the other hand, where the additional prior art cited by the party attacking the validity of the patent is no more pertinent than that considered by the Examiner, the presumption of validity may be only be overcome by showing that the Examiner erred in allowing the claims. *See id.* (citing American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1359 (Fed.Cir.), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984)).

A. The Prior Art, Level of Skill in the Art, and Secondary Considerations

In support of its invalidity claim due to obviousness, Sears proffers several prior art references. Specifically, Sears relies on two alternative combinations of references: (1) the Whirlpool brochure and the '027 patent, or (2) the '027 patent, and U.S. Patent Number 4,771,154 ("the Bell patent") as rendering the claims of the '865 patent obvious. (*See* Def.'s Br. at 34.) These combinations purportedly recognize the inability of a microwave to brown the exterior of food and suggest the combination of microwave cooking and infrared heat, with use of browning dishes, to solve the browning problem. FN20 (*See* id.) The Court notes that Sears does not allege that the foregoing references were not before the Examiner.

FN20. Sears proposes another line of prior art references as disclosing the use of browning dishes with metallic food contacting surfaces and with insulating trays for supporting the food contacting surface. (*See* id. at 35 (referring the Court to Jorgenson (Def.'s Exh. 9), Teich (Def.'s Exh. 11), Tanonis (Def.'s Exh. 8), Anderson (Def.'s Exh. 10), the "Microwave Plus" product by Corning (Def.'s Exh. 21), and the "Single Sizzle" product (Def.'s Exh. 22).) Sears maintains that such browning dish references " *per se* merely disclose in greater detail what the Whirlpool brochure and the '027 patent disclose," *i.e.*, that microwave browning dishes were available pre-1990, that such dishes were intended to be preheated and then food placed in contact with the dish, resulting in a browning of the food surface in contact with the browning dish. (Id.) Lastly, Sears proffers yet another line of "highly relevant" prior art in the form of patents that disclose a combination of microwave and infrared heating ovens. These references include the Bell patent, in addition to the Dill and British Application patents. (*See* id. (the latter two patents disclose combination microwave-broiler type ovens).) Joined with Richard Deacon's cookbook entitled "Richard Deacon's Microwave Cookery," Sears proposes that these references are highly relevant because the claims of the '865 patent require use of microwave heating to pre-heat the browning dish followed by placement of the food and dish beneath an infrared broiler. (*See* id.)

As discussed *supra* with respect to the anticipation issue, Sears repeats that because the Whirlpool brochure and the '027 patent suggest the use of a microwave browning dish in combination with an infrared broiling element, both teach claims 1 and 13 of the '865 patent. (*See* id. at 36.) More particularly, while the brochure does not disclose a thermal insulating tray for supporting the microwave browning dish, Sears asserts that the '027 patent and the Bell patent include, respectively, an insulating tray or support for supporting the browning surface. (*See* id.) And the Whirlpool brochure discloses that the browning dish should be able to resist heat damage if exposed to an infrared broiler, while both the Bell and '027 patents apply browning dishes able to withstand heat imposed by a broiler. (*See* id.) Accordingly, Sears concluded that any combination of the Whirlpool/'027 patent or the '027 patent/Bell explicitly discloses every limitation of claims 1 and 13. Thus, claims 1 and 13 are invalid for obviousness under s. 103(a).FN21

FN21. Sears also contends that dependent Claims 2 and 3 are obvious in light of either of the aforementioned combinations. Claim 2 is obvious because it merely requires the browning dish to function as a heated serving platter after the food is cooked. Sears sets forth that any microwave browning dish can be used as a serving platter as it will retain some heat after use. Sears frames Claim 3 as merely requiring the broiling element to be disposed within the microwave oven; such combination oven-broiler units were available well before February 18, 1990 and their use is taught specifically in the Bell and '027 patent.

Sears alleges that the '027 patent specifically teaches Claim 4's requirement that the browning dish have a metal food contacting surface with the microwave-lossy composition being disposed underneath the metal food-contacting surface. Further, Levinson testified that metal browning dishes were well known and in the public's possession. And because the Whirlpool brochure also renders Claim 4 obvious as it advocates the

use of available browning dishes.

Claim 7 is also obvious because the microwave browning dish is intended to be used in the microwave oven; Claim 7 merely requires the food to be cooked with microwave energy after the browning dish is preheated and before the food on the browning dish is broiled.

Lastly, Claims 9-11 are rendered obvious because it is obvious to place any food product on a preheated browning dish to brown the underside of the product that comes into contact with the dish. (*See* Def.'s Br. at 37-39.)
Because the first three matters of factual inquiry have been fully addressed within the anticipation analysis,FN22 the Court will now turn its attention to the objective indicia of non-obviousness often termed secondary considerations. Although the parties do not dispute the level of ordinary skill in the art (*see* Def. Br. at 39; Plf. Dep. at 295:16-25, 296:1-9), Sears maintains that the pleadings do not evidence commercial success, a long-felt but unsolved need fulfilled by Levinson, or the failures of others which would support the validity of Claims 1-4, 7-11, and 13. (*See* Def.'s Br. at 39.)

FN22. Levinson testified that one of ordinary skill would be a chef or the writer of a cookbook. (*See* Def. Exh. 3 (Plf.Dep.) at 295:8-25; 296:1-4.)

Levinson relies in part on secondary considerations to support his claim for validity, reasoning that Sears' allegedly infringing invention discussed infra-the VIP oven-received "worldwide acclaim." (Plf.'s Reply at C10.) Moreover, Levinson indicates that Whirpool has sold approximately one billion dollars worth of infringing material, albeit a large percentage of those sales were outside of the United States. (*See* Plf. Br. at B5.) While the amount of sales may be a matter better left to the damages aspect of this case, it may be inferred that the remaining sales within the United States demonstrate commercial success. The VIP oven further exemplifies that the '865 patent's method solved a long-felt need as Whirlpool modified the allegedly infringing invention to include the '865 patent's methodology. (*See* id.) Levinson relies on this modification to establish that others were unsuccessful in making the alleged invention and that the alleged invention was copied by others in the art. (*See* id. (the Court is not certain whether the "alleged invention" refers to the '865 patent).) Lastly, Levinson reasons that the '865 patent departed from other principles of the art as it "teaches to brown and crust bread ... directly under the intense heat of an oven broiler rather than, as taught in the prior art, in the relatively gentle, even heat of a conventional oven." (*See* id. at C11 (emphasis omitted).)

Sears counters, maintaining that Levinson fails to meet his burden of establishing commercial success in the absence of any indication of sales volumes or any other criteria which might establish commercial success. (*See* Def. Reply at 15.) Further, Sears reasons that a long-felt need has not been established as the '865 patent does not implement any new structure. (*See* id.)

The Court finds that the prior art cited by Sears were in fact before the Examiner. The defendant has not demonstrated that the additional prior art cited is no more pertinent than that considered by the Examiner. Sears has not, therefore, weakened the presumption of validity and hence has not eased its difficult burden of proof.

B. Difference Betweeen the Prior Art and the Claimed Subject Matter As a Whole

Turning to the merits, Levinson has not submitted an affidavit by any expert in which the novelty and uniqueness of his invention is described and differentiated from the prior art. Rather, the plaintiff relies upon his patent expert Harry Keck, Esq.'s report of January 23, 1997, in addition to Levinson's own testimony coupled with corroboration of Keck's findings. (*See* Def.'s Exh. 26.)

As recognized earlier, the '865 patent does not cite the '027 patent, the Whirlpool brochure, or the Bell patent under the listing of "References Cited." Nevertheless, as discussed above, the section entitled "Background of the Invention" of the '865 patent expressly raises the '027 patent's, in addition to covering the general informational nature of the Whirlpool brochure. As for the Bell patent, the Court reiterates that Sears does not contest that the additional references were indeed before the Examiner. Levinson and Keck argue that the Bell patent teaches an apparatus that does not teach preheating or a metal tray, while the '865 patent requires preheating and involves a considerably slower metal browning device. (*See* Plf. Reply at C8 (quoting Def.'s Exh. 4 (Bell patent) at col.3, lines 11-14 ("The support therefore acts as a fluid heat pipe, which can conduct heat more rapidly than a metallic conductor.")); Def.'s Exh. 26 at 3 (Keck letter of 6/21/94 or 5/30/94).) Sears maintains that "many of Plaintiff's claims do not include the limitation of the browning/crusting device being metal (see claims 1-3, 6-8), so this point of difference does not assist in avoiding the invalidity of those claims ... There is no prohibition in this [ ] embodiment with respect to the material of the utensil [ ], which easily could be made of metal as taught by the '027 patent. (*See* Def. Reply at 12.) Levinson and Keck further set forth that the Bell patent does not teach sequential heating of food by microwave and then by infrared heat. (*See* Def.'s Exh. 26 at 3.)

Levinson also relies on his own expertise to establish that the '865 patent is a new method that uses established parts. (*See* Plf. Reply at D11.) Ultimately, Levinson does not appear to dispute the existence of publications and numerous patents utilizing devices not unlike those found in the '865 patent.FN23 (*See, e.g.,* Def .'s Br. at 8 (citing several applicable patents).) As this Court reasoned prior and as recognized by the Court of Appeals for the Federal Circuit, "[v]irtually all inventions are necessarily combinations of old elements. The notion, therefore, that combination claims can be declared invalid merely upon finding similar elements in separate prior patents would necessarily destroy virtually all patents and cannot be the law under the statute, s. 103 ." Panduit Corp., 810 F.2d at 1575.

FN23. Indeed, in addition to admissions of an awareness of patents utilizing insulating trays, metal cooking surfaces, and browning dishes, *see supra,* Levinson admitted that preheating was an accepted practice as of 1965 "when [he] invented it." (Exh. 3, Plf. Dep. at 207:8-11.)

The '865 patent concerns new methods of combining conventional and microwave cooking technology. The '865 patent's uniqueness and novelty rests on its methods for utilizing prior art microwave cooking with prior art infrared cooking to improve the browning and crusting of food. *See supra* text at 30-31 (setting forth the objects of the '865 patent), 33. As stated above, small differences between the claims and the prior art can give rise to patentability.FN24 The Court is of the opinion that these differences do not render the claimed process unpatentable.

FN24. Expanding on this line of thought, the United States Court of Appeals, Federal Circuit, has reasoned that:
[n]o effective, uniform, reliable patent system could long survive if the law permitted a decisional approach

to s. 103 determinations ... (1) interpreting claims by redrafting them to one word; (2) implying that that word describes the differences; (3) picking from a prior patent an item describable by that word (in effect, finding *no* differences); (4) focusing on isolated minutiae in a prior art patent while disregarding its scope, i.e., its entire disclosure, and how its disclosed structure works; (5) making no finding of a suggestion (because there was no evidence thereof) that items found separately in prior patents could or should be shaped positioned, related, and combined as in a claim; (6) considering as prior art what was not; (7) considering not the problem solved by the invention ... but speculating on a "problem" of how prior devices might be reconstructed to match the claimed structure, with the benefit of hindsight aided by the inventor's engineering testimony about the inventions in suit ...."

Panduit Corp., 810 F.2d at 1574.

Sears has not come forth with any affidavits of someone skilled in the art to contradict the analysis set forth by Levinson and Keck. Sears primarily relies on its counsel's interpretations of the prior art. The defendant does offer the declaration of Donovan J. Fandre, but that declaration essentially sets forth Fandre's opinion that the '865 patent was not new as of February 18, 1990- this inquiry goes to anticipation. *See supra* text at 14-15. Therefore, the presumption of validity has not been overcome as no showing has been made that the Examiner erred in allowing the claim. The Court concludes that, after addressing the four factual inquiries relevant to the question of obviousness, Sears could not convince a fact finder by clear and convincing evidence that the '865 patent is obvious over the prior art. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Hence, there are no material issues of fact as to the validity of the '865 patent. Accordingly, the Court will deny Sears' motion for summary judgment as to patent invalidity. The patent is valid as a matter of law.

VI. Infringement

The Court now turns to the cross-motions for summary judgment of infringement or noninfringement. Determining patent infringement requires determining whether someone (1) without authority (2) makes, uses, offers to sell, sells, or imports (3) the patented invention (4) within the United States, its territories, or its possessions (5) during the term of the patent. *See* 35 U.S.C. s. 271(a) (West Supp.1998). There is infringement, generally, if any of the patent's claims cover the alleged infringer's product or process. *See* SmithKline Diagnostics v. Helena Lab. Corp., 859 F.2d 878, 889 (Fed.Cir.1988). Before making this determination, it is necessary to determine what the words in the claim mean. *See id* . Accordingly, the issue of patent infringement may be resolved in two steps: (1) interpretation of the claims of the patent and (1) comparison of the claims with the accused device. *See* Syntex Pharms. Int'l. Ltd., 721 F.Supp. at 660 (citations omitted). Although claim interpretation is a question of law, *see* Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), a dispute as to the meaning of terms in a claim is a question of fact. *See id*. (citing Perini America, Inc. v. Paper Converting Machine Co., 832 F.2d 581, 584 (Fed.Cir.1987)). Indeed, the Court must always refer to certain extrinsic evidence-the patent specification, prosecution history and other claims-to interpret a disputed claim. *See* Syntex Pharms. Int'l, Ltd., 721 F.Supp. at 660 (citations omitted). Also helpful is expert testimony, including evidence of how one skilled in the art would interpret the claim. *See id*. (citations omitted). On the other hand, an inventor is not bound by the ordinary meaning of terms but is free to be his or her own lexicographer. *See id*. (citations omitted). "The ordinary meaning of claim language ... is not dispositive and resort must still be had to the specification and prosecution history to determine if the inventor used the disputed terms differently than their ordinary accustomed meaning." *Id*. (quoting ZMI Corp. v. Cardiac Resuscitator Corp., 844 F.2d 1576, 1580 (Fed.Cir.1988)).

Patent infringement may be found in either of two ways: literal infringement or infringement under the doctrine of equivalents. Literal infringement occurs when every limitation of the patent is found in the accused device literally. *See id*. (citation omitted). In the absence of literal infringement, a product nevertheless infringes under the doctrine of equivalents if it performs substantially the same function in substantially the same way to achieve substantially the same result as the claimed invention. *See id*. (citing Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608, 70 S.Ct. 854, 94 L.Ed. 1097 (1950)). Here, Levinson claims literal infringement of claims 1, 3, 4, 7, and 13 of the '865 patent . FN25 (*See* Complaint Counts 1 & 2.)

FN25. Levinson also maintains that Sears refused his offer of a license under the '865 patent, in addition to refusing to cease and desist the continued infringement. (*See* Complaint Count 2.)

Generally, a claim is literally infringed if each properly construed claim element reads on the accused product or process. *See generally* Key Mfg. Group, Inc. v. Microdot, Inc., 15 U.S.P.Q.2d (BNA) 1195 (E.D.Mich.1990), *rev'd,* 925 F.2d 1444 (Fed.Cir.1991). In other words, for Sears to literally infringe claims 1, 3, 4, 7, and 13 of the '865 patent, every limitation of those claims must be found in Sears' accused device. Levinson maintains that Sears has literally infringed in its "demonstration, maintenance and sale of said microwave ovens." (Complaint Count 1.)

A. Comparison of the Claims With the Accused Device

Given that the preceding analysis interpreted the claims of the '865 patent, the Court now focuses on a comparison of the claims with the accused device. The one-page advertisement or brochure for the Whirlpool VIP Crispwave microwave oven-the allegedly infringing device-discloses a system that "crisps, grills, and microwaves evenly for food that looks and tastes oven baked." (Plf.Br.Exh. 12.) The advertisement contains a section entitled "Consumer Preferences" and listed in that section is "browning/crisping ability." A stated purpose of the VIP oven is to provide "old-fashioned cooking in just one third the time of a conventional oven." As discussed at length supra, the '865 patent employs new methods utilizing prior art microwave cooking with prior art infrared cooking to improve the browning and crusting of food.FN26

FN26. Attached to the VIP oven advertisement is an advertisement which reads: "A Brilliant Breakthrough!" and continues, "[f]or perfect and ultra-fast roasting, only crisp plates by MUSORB ensure the proper browning and crispiness of your dishes." (Plf. Br. Exh.12 (Musorb is the "premier manufacturer" of microwave utensils).) The Court finds that Levinson does not contend that the Musorb crisp plates are infringing the '865 patent; plaintiff's attorney and patent expert Keck expressly sets forth that "the VIP oven is the only WHIRLPOOL product that infringes the ['865] patent (so far as we know at this time)." (Def. Exh. 26 (Keck letter) at 10.) Accordingly, the Court will not address the Musorb advertisement in rendering an infringement determination.

Keck contends that the device at issue infringes because of Whirlpool's "dedicated cookbook instructions, special operating instructions, specially-designed cooking surfaces, and the dedicated operating buttons." (Def. Exh. 26 (Keck letter) at 11.) Keck argues that both the '865 patent and the VIP cookbook teach preheating and sequential heating.FN27 (*See* id. at 5.) More particularly, dependent Claim 3 is "fully met by

Whirlpool's infringing activities." (Id. at 9.) Keck requests that Sears "determine whether the Levinson claims *dominate* your heavily promoted method of cooking." (Id. (emphasis added).) The Court notes that "domination" does not constitute literal infringement. As set forth *supra* and reiterated herein, every limitation of claims 1, 3, 4, 7, and 13 of the '865 patent must be found in Sears' accused device for a finding of literal infringement.

FN27. Keck states that the VIP oven structure is "not at issue." (Id. at 4.)

Keck's letter sets forth that "Consumer Reports rated the food favorably when prepared in the VIP oven with the metal browning dish following those cooking features which constitute Levinson's invention. The VIP is sold with a specially-designed, metal heating device and is sold with a dedicated cookbook that contributes to and induces infringement of Levinson's patent. The VIP oven has a dedicated button that operates the VIP oven to infringe Levinson's claims." (Def. Exh. 26 (Keck letter) at 3.) Levinson's reference to a "dedicated button" is not clear to this Court. Also ambiguous is how the Whirlpool cookbook contributes to and induces infringement of the '865 patent. That cookbook is not included in the parties' pleadings.

B. Literal Infringement

From what the Court can glean from the pleadings, Levinson has apparently made a number of demands on Sears to identify evidence that defendant relies upon to allege that the '865 patent is not infringed.FN28 Sears has not been responsive. Rather, the defendant appears to have relied on establishing the invalidity of the '865 patent as its pleadings almost exclusively address the validity issue. Sears does not appear to directly contend that there has been no literal infringement of the '865 patent. Indeed, Levinson sets forth "[i]nstead of taking issue with our findings of literal infringement, Sears and Whirlpool simply repeated again and again the meaningless statement that "one can not [sic] infringe the claims of an invalid patent." FN29 (Plf. Br. at B3.)

FN28. Levinson sets forth that he sent Sears a twenty-five page document detailing the facts that plaintiff relies upon to allege infringement. Sears apparently refused to counter, rebut, or even respond to said letter. (*See* Complaint Count 2.)

FN29. Despite Sears' receipt of Levinson's infringement notice on November 30, 1993, Levinson points out that Sears has refused to file a reexamination request with the PTO to establish clear title to what the defendant sells. (*See* Plf. Br. at B2.)

The Complaint sets forth that Sears refused Levinson's request to consider an out-of-court settlement. (*See* Complaint Count 2.)
Alternatively, Sears appears to argue that it does not infringe any valid claims of the '865 patent. The Court emphasizes that infringement is separate and distinct from the validity issue. Further, Keck contends that this statement "begs the question of whether [Sears] ha[s] any basis for denying infringement of Levinson's presumed valid claims." (Def. Exh. 26 (Keck letter) at 1-2.) This Court has determined the "865 patent to be valid.

Levinson submits that Whirlpool's representatives admitted that the VIP microwave ovens at issue literally infringe the '865 patent. Mr. Guynn (an attorney for Sears) maintains that he did not make this statement. (

See Plf. Br. at B6.) However, Levinson provides a portion of Guynn's June 15, 1995 letter thanking Levinson for a meeting at plaintiff's home with Guynn and Bob Rice from Whirlpool on May 18, 1995. "During that meeting you demonstrated to us the steps described in your above noted patent of pre-heating a dish, placing a food item on it, cooking the food with microwave energy then browning the top with infrared energy. You did this both with a frozen pie as well as a frozen pizza." (Plf. Br. at B6.) Levinson sets forth that the pizza pie demonstration was prepared in the Whirlpool VIP microwave oven that Levinson had purchased from Sears. Thereby, the foregoing demonstration compared the steps to prepare a pizza taught in Whirlpool's cookbook to the steps taught in the '865 patent's claims. Accordingly, Levinson maintains that this demonstration proves that Whirlpool's VIP microwave ovens literally infringe the claims of the '865 patent. (*See* id.) Whether Levinson is alleging infringement by the VIP oven or the Whirlpool cookbook, or both, is not clear to the Court. Moreover, as set forth above, the allegedly infringing cookbook has not been included in the pleadings provided to the Court.

Despite the insufficiency of the pleadings, the accused VIP microwave oven employed by Sears does not appear to contain every limitation of Claims 1, 3, 4, 7, and 13 of the '865 patent. However, the Court's analysis is hampered by the sparse information provided regarding the features, devices, and, most importantly, the methodology of the allegedly infringing VIP microwave oven. Levinson does not categorically set out the alleged literal infringement. For example, reference is made to a twenty-five page letter to Sears setting forth such infringement, *see* supra note 28, but the document is not in the pleadings. Accordingly, at this juncture, Levinson has failed to establish infringement and Sears has likewise failed to demonstrate noninfringement. Accordingly, the matter shall be tried to a jury to resolve the genuine issues of material fact that clearly remain in dispute as to infringement of the '865 patent, Claims 1, 3, 4, 7 and 13. Thus, the Court will deny the cross-motions for summary judgment as to infringement and noninfringement.

CONCLUSION

For the reasons set forth herein, the Court will deny plaintiff Melvin L. Levinson's reconsideration motion and affirm this Court's Opinion and Order of October 31, 1997. Further, the Court will grant Levinson's summary judgment motion as to the validity of U.S. Patent No. 5,094,865. Lastly, as genuine issues of material fact remain in dispute, the Court will deny Levinson and defendant Sears, Roebuck & Company's cross-motions for summary judgment as to infringement or noninfringement of Claims 1, 3, 4, 7, and 13 of the '865 patent; the matter shall go to a jury.

An appropriate Order is attached.

ORDER

In accordance with the Court's Opinion filed herewith,

It is on this 14th day of May, 1998

ORDERED that plaintiff Melvin L. Levinson's reconsideration motion is denied; and it is further

ORDERED that this Court's Opinion and Order of October 31, 1997 is affirmed; and it is further

ORDERED that Levinson's summary judgment motion as to the validity of U.S. Patent No. 5,094,865 is granted; and it is further

ORDERED that Levinson and defendant Sears, Roebuck & Company's cross-motions for summary judgment as to infringement or noninfringement of Claims 1, 3, 4, 7, and 13 of the '865 patent are denied.

D.N.J.,1998.
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