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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ALLAN SIDNEY BRAMLEY and
TERESA JANE BRAWN

Appeal 2011-010567
Application 11/890,748
Technology Center 1700

Before BRADLEY R. GARRIS, CATHERINE Q. TIMM, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision to reject claims 1-7. The sole ground of rejection on appeal is the rejection of claims 1-7 under 35 U.S.C. § 103(a) as obvious over Lindner¹ in view of Barnes², as evidenced by "What is Milk Solids non-Fat?"^{3,4} We have jurisdiction under 35 U.S.C. § 6(b).

¹ Lindner et al., EP 1 541 034 A1, pub. Jun. 15, 2005.

² Barnes et al., US 6,120,813, patented Sep. 19, 2000.

We REVERSE.

The invention is directed to ice confections having a brittle, crunchy and crumbly texture and a honeycomb appearance produced by aerating a particular formulation with a water-soluble gas such as carbon dioxide, nitrous oxide, or mixtures thereof (Spec. 2:1-11). The honeycomb structure has large, visible gas bubbles with a range of different sizes which provides the product with a distinctive appearance and texture (i.e. crunchier and/or crumblier than the unaerated confection) when it is bitten into (Spec. 1:13-19). Claim 1 is illustrative:

1. An ice confection comprising:

- 1 to 8 wt% fat
- a total solids content of from 10 to 25wt%;
- an ice structuring protein (ISP);
- at least 0.1 wt% aerating agent

the confection being obtainable by a process comprising aerating a mix with an aerating gas which contains at least 50% by volume of carbon dioxide, nitrous oxide or mixtures thereof, the confection having a brittle, crunchy and crumbly texture and a honeycomb appearance.

(Claims App'x at Br. 10.)

³ “What does the term “Milk Solids Non-Fat” mean?, www.innovatewithdairy.com/innovateWithDairy/Articles/FAQ_MilkSolidNF_32905.htm, Jun. 2009.

⁴ The provisional nonstatutory obviousness-type double patenting rejection of claims 1 and 2 over claims 1 and 3 of Application 11/665,282 (Final Rej. 8; Ans. 11-12) is moot. Application 11/665,282 has been abandoned (*See* Application 11/665,282, Notice of Abandonment filed June 13, 2001).

OPINION

Lindner teaches adding ice structuring proteins (ISPs) to a wide range of frozen confectionary products, including milk-containing frozen confections such as milk-ice (Lindner, ¶¶ [0030] and [0037]). Lindner suggests formulating milk-ice with a concentration of fat of 2-7 wt%, a range wholly within Appellants' claimed range of 1-8 wt% (Lindner, ¶ [0037]). Lindner also suggests aerating such milk-containing frozen confections (*id.*). But Lindner is silent with respect to the identity of the aerating gas.

Barnes teaches a water-ice product having voids in the form of tortuous, non-spherical channels formed by water soluble aerating gas (Barnes, col. 1, ll. 51-56 and col. 2, ll. 7-9). The water-ice product is made essentially from sugar, water, fruit acid or other acidifying agents, color, fruit or fruit flavoring (Barnes, col. 2, ll. 31-33). Therefore, while Barnes aerates with water-soluble gas as required by claim 8, Barnes' water-ices do not have the 1-8 wt% fat content required by Appellants' claim 8.

It was known in the art that water-ice products aerated with a water-soluble aerating gas have a different structure than products aerated with air (Spec. 1:21-23). The gas that is dissolved out of solution increases internal pressure and breaks the walls between neighboring gas bubbles thereby forming voids or channels rather than the spherical bubbles needed to form a honeycomb structure (Spec. 1:24-26 and 14:1-8). As discussed above, Barnes teaches forming such channels with water-soluble aerating gas.

It was also known in the art to combine water-soluble gas and ISP, also known as antifreeze protein, to obtain a water-ice confection having a brittle, crunchy texture (Spec. 1:24-28; Spec. 3:17-28). However, according

to Appellants' Specification, those confection products, while brittle and crunchy, do not have a honeycomb structure (Spec. 1:28-29).

We agree with the Examiner that the prior art provides a suggestion to combine the teachings of the references to obtain an ice confection having the composition required by the claims (Ans. 13). However, the Examiner has not established that it would have been obvious to one of ordinary skill in the art to achieve a honeycomb structure from that composition.

Appellants rely upon data disclosed in the Specification as demonstrating that it was unexpected to obtain a honeycomb appearance when aerating the composition of the claims, which contains fat in addition to ISP and water soluble aerating gas (Br. 6-7). The Examiner has not properly considered that evidence.

Appellants rely upon a comparison between Examples 1-3 and Comparative Examples A-C.

Examples 1-3 are milk-ice formulations according to the invention (Spec. 12:11; Table 1). These formulations produced an ice confection having a brittle, crunchy texture and a honeycomb-like appearance without channeling (Spec. 14:24 to 15:13).

Like Barnes, Comparative Example A is a water-ice formulation, which does not contain fat (Spec. 12:12-13; Table 1). It has a brittle and crunchy texture as expected, and as further expected, the gas bubbles underwent channeling so that the appearance was not honeycomb-like (Spec. 14:1-8).

Like Lindner, Comparative Example B is a milk-ice. While Lindner is silent with respect to the aerating gas used, Comparative Example B was aerated with air (Spec. 12:13-15; 13:10-11; Table 1). The product had a

firm, crunchy texture, but did not have a honeycomb-like appearance of the inventive examples, which were aerated with carbon dioxide (Spec. 14:10-15)

Comparative Example C has the same formulation as Example 1, but without ISP (Spec. 12:15-16; Table 1). It had neither the crunchy texture nor the honeycomb-like appearance of the inventive examples (Spec. 14:17-22).

According to Appellants, the honeycomb-like appearance was an unexpected result of the combination of fat, ISP, and water soluble aerating gas as evidenced by the examples (Br. 6-7).

The Examiner determines that the evidence is insufficient because Comparative Examples A-C “are not representative of the prior art relied upon to reject the claims.” (Ans. 14.) This is because, according to the Examiner, “the combination of Linder [sic] in view of Barnes disclose of fats, milk components, ISP, aerating agent and aerating gas in the recited range of the Appellant as discussed regarding the rejection of claim 1.” (Ans. 16.) The Examiner reasons that it would have been expected that the ice confection suggested by the combination of Lindner and Barnes would have resulted in the crunch, crumbly, and honeycomb structure (Ans. 16).

However, we agree with Appellants that the Examiner has not provided a reasonable basis for the determination that a honeycomb structure would have been expected from the prior art (Reply Br. 7). Comparative Example A and Barnes provide evidence that water-ices were known to result in channeled appearances, not honeycomb appearances, and the Examiner cites to no evidence with regard to what appearance was expected for ice-milks or ice confections aerated with air or water-soluble gases.

Moreover, the Examiner is improperly requiring a comparison between the claimed invention with something that does not exist in the prior art, i.e., a theoretical composition based upon the combined teachings of Lindner and Barnes. To support a showing of unexpected results, an applicant is tasked with establishing an unexpected difference in results between the claimed subject matter and the closest prior art. *In re Baxter Travenol Labs*, 952 F.2d 388, 392 (Fed. Cir. 1991). The applicant is not required to create prior art, nor to prove that his invention would have been obvious if the prior art were different than it actually was. *In re Geiger*, 815 F.2d 686, 690 (Fed. Cir. 1987) (J. Newman concurring). Requiring an applicant to compare the claimed invention to the composition of Lindner as modified by the aerating gas of Barnes would amount to requiring comparison of the results of the invention with the results of the invention. This is improper. *See In re Chapman*, 357 F.2d 418, 422 (CCPA 1966).

CONCLUSION

We do not sustain the Examiner's rejection.

DECISION

The Examiner's decision is reversed.

REVERSED

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