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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MARCUS PARSONS and JEFFREY MEYERS

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Appeal 2011-010578  
Application 11/736,907  
Technology Center 1700

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Before BRADLEY R. GARRIS, CATHERINE Q. TIMM, and KAREN M. HASTINGS, *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, 4-12, 14-19, 21, and 22. We have jurisdiction under 35 U.S.C. § 6(b).

For the reasons presented by the Examiner in the Answer, we AFFIRM. We add the following for emphasis.

The claims are directed to ready-to-eat cereal, and a method of making the cereal (Claims 1 and 10). The ready-to-eat cereal includes cereal pieces coated with a composition containing a sweetener and a flavor (Claim

1; Spec. ¶ [0012]). The cereal pieces contain encapsulated flavor particles that are distributed throughout the bulk of the dough before baking and/or extruding the dough (Claims 1 and 10; Spec. ¶¶ [0007], [0009], and [0019]). Encapsulating the flavor allows the flavor to withstand the elevated temperatures and pressures of the cereal cooker/extruder (Spec. ¶ [0013]). The coating is applied after the baking and/or extruding of the cereal base (Spec. ¶ [0026-27; Fig. 1). Claim 1 is illustrative of the cereal:

1. A ready-to-eat cereal comprising:

cereal pieces,

each cereal piece having an exterior and comprising cooked cereal dough and a plurality of encapsulated flavor particles containing at least one flavor distributed throughout the cooked cereal dough, the encapsulated flavor particles being rupturable upon normal human mastication;

each cereal piece further comprising a coating comprising a sweetener and a flavor on the exterior of the cereal pieces, wherein the flavor provides an initial taste sensation upon consumption and wherein the flavor comprises a different flavor than the encapsulated flavor particles.

(Claims App'x. of the Br. (indenting added).)

Claim 10 is illustrative of the method:

10. A method of making a ready-to-eat cereal product comprising:

providing a cereal flour;

mixing encapsulated flavor particles containing at least one flavor into the flour to form a mixture, the encapsulated flavor particles capable of withstanding the conditions of processing by a cereal cooker/extruder without rupturing, but which rupture upon normal human mastication;

cooking the mixture;

forming the mixture into discrete cereal pieces having an exterior; and

coating the exterior of the cereal pieces with a flavor syrup, wherein the flavor syrup comprises a sweetener and a flavor, wherein the flavor provides an initial taste sensation upon consumption and wherein the flavor comprises a different flavor than the encapsulated flavor particles.

(Claims App'x. of the Br.)

The Examiner rejects all the claims under 35 U.S.C. § 103(a) as obvious. Claims 1, 4, 6, 8, and 9 are rejected as obvious over Le<sup>1</sup> in view of Wampler.<sup>2</sup> Claims 1, 4-12, 14, 15, 17-19, 21, and 22 are rejected as obvious over Wampler in view of Lyall.<sup>3</sup> Claim 16 is rejected as obvious over Wampler, Lyall, and Weinstein<sup>4</sup>.

With respect to the rejection over Le in view of Wampler, Appellants do not argue any claim apart from the others (Br. 10-14). In accordance with 37 C.F.R. §41.37(c)(1)(vii), we select claim 1 as representative for deciding the issues on appeal for the rejection over Le and Wampler.

With respect to the rejection over Wampler in view of Lyall, and the rejection over Wampler, Lyall, and Weinstein, Appellants' arguments focus on issues arising for claims 1 and 10 (Br. 14-17). Therefore, for those rejections our focus will be on the issues arising for those claims.

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<sup>1</sup> Le et al., WO 2006/085240 A1, pub. Aug. 17, 2006.

<sup>2</sup> Wampler et al., WO 93/19621, pub. Oct. 14, 1993.

<sup>3</sup> Lyall et al., US 3,959,498, May 25, 1976.

<sup>4</sup> Weinstein, US 5,518,749, patented May 21, 1996.

## OPINION

### *Rejection over Le and Wampler*

The Examiner's rejection over Le in view of Wampler is based upon the combination of Le's coating with Wampler's cereal pieces (Ans. 4-5).

Le discloses cereal pieces (Kix<sup>®</sup> crispy corn puffs) coated with a syrup containing liquid honey or liquid strawberry flavor (*see, e.g.*, Le, Example 4 at p. 18, l. 25 to p. 20, l. 11). In example 4, Le compares coatings containing encapsulated flavor to coatings containing non-encapsulated flavor (*id.*). Taste testers found that the cereals with coatings containing encapsulated flavor had stronger flavor profiles after high temperature coating and/or drying of the coated cereal (Le, p. 20, ll. 1-11).

Wampler, like Le, discloses encapsulating flavor compositions in food products to protect the flavor composition from heat treatment processes such as baking (Le, p. 2, ll. 13-30; p. 13, ll.17-20; Wampler, p. 5, l. 24 to p. 6, l. 16). While Le uses the encapsulated flavor in a coating placed on the food product before drying, baking and/or toasting the coated food product, Wampler teaches placing the encapsulated flavor in either coatings or in the bulk of a wide range of food products, and also specifically exemplifies mixing the encapsulated flavor throughout a cereal dough to be extruded and cooked (Le, p. 2, l. 32 to p. 3, l. 4 and p. 8., ll. 5-7; Wampler, p. 5, ll. 2-14, and Examples starting at p. 13, especially, Example 14 at p. 17, ll. 10-26, and Example 33 at p. 27, ll. 2-19).

Appellants contend that Le teaches away from employing *non-encapsulated* flavors for products subject to heat treatments, such as coatings for cereal pieces, and Wampler fails to provide a reason for employing a

coating including a *non-encapsulated* flavor because Wampler teaches encapsulating flavors to protect them from the heat of cooking and food preparation (Br. 11-13).

The issue is: Have Appellants identified a reversible error in the Examiner's finding of a reason for combining the teachings of Le and Wampler that results in a coated cereal piece that meets the requirements of claim 1?

In order to decide the above issue, we must first determine the meaning of "flavor" as used in the claim phrase "a *flavor* on the exterior of the cereal pieces." This is because Appellants' arguments are directed to *non-encapsulated* flavors in the coating rather than encapsulated flavors. But it is the Examiner's position that the claim language "flavor" encompasses encapsulated flavors as well as non-encapsulated flavors (Ans. 15). There is no dispute that Le teaches a coating including encapsulated flavors and that the Examiner has provided a reason for combining that coating with the cereal pieces of Wampler.

Claim 1 reads, in relevant part, "a coating comprising a sweetener and a *flavor* on the exterior of the cereal pieces, wherein the *flavor* provides an initial taste sensation upon consumption and wherein the *flavor* comprises a different flavor than the encapsulated flavor particles" (emphasis added).

The most relevant ordinary and customary definition of "flavor" consistent with the use of this word in the Specification is "a substance that flavors," Merriam-webster.com/dictionary/flavor, or "a substance or extract that provides a particular taste; flavoring," dictionary.reference.com/browse/flavor.

The Specification contains no definition of “flavor” (Spec., in its entirety).

The claim itself uses “encapsulated” to modify the word “flavor” when referring to the “encapsulated flavor particles.” No modifier is used when referring to the “flavor” used in the coating.

During examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Although claims are to be interpreted in light of the specification, limitations from the specification are not to be read into the claims. *See In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993). An applicant seeking a narrower construction must either show why the broader construction is unreasonable or amend the claim to expressly state the scope intended. *In re Morris*, 127 F.3d 1048, 1057 (Fed. Cir. 1997).

The claim itself and the Specification support the Examiner’s interpretation of the claim language.

Appellants contend that claim 1 requires that the flavor in the coating be non-encapsulated because the claim further reads “wherein the flavor provides an initial taste sensation upon consumption” (Reply Br. iv). However, Appellants do not direct us to any part of the Specification that requires that the initial taste sensation upon consumption be necessarily due to non-encapsulation. It would seem that any flavor would provide an initial taste sensation upon consumption. If the flavor were encapsulated, it would still provide an initial taste sensation upon consumption because consumption involves mastication that would break the capsules. Moreover,

the Specification indicates that the initial taste sensation may occur due to selection of a different or complementary flavor in the coating rather than due to a difference in the intensity of the same flavor, one encapsulated and one not (Spec. ¶ [0018]). The Specification does not make it clear that the initial taste sensation is due to using non-encapsulated flavor in the coating.

We determine that it was reasonable for the Examiner to interpret the word “flavor” in claim 1, when not modified by the word “encapsulated” or “non-encapsulated,” as a flavor that is open to being either non-encapsulated or encapsulated. Even if Le taught away from, and Wampler failed to provide motivation for, using non-encapsulated flavor, there is no argument that there is a teaching away or lack of motivation for using a coating containing encapsulated flavor. Therefore, we cannot say that Appellants have identified a reversible error in the Examiner’s finding of a reason to combine the teachings of the references.

Moreover, the prior art also provides evidence that it was known in the art to coat cereal with non-encapsulated flavor (*see, e.g.*, comparative examples within Le’s Example 4).

Le and Wampler both explain that encapsulating flavor particles renders them heat-stable, protects them environmentally, and allows for better flavor retention during baking, extruding, and other heat treatments (Le, p. 3, ll. 24-30; Wampler, p. 5, ll. 2-14). However, as explained by the Examiner, the fact that Le describes advantages for using encapsulated flavors is not a teaching away of a caliber that warrants a conclusion of non-obviousness (Ans. 15). “[J]ust because better alternatives exist in the prior art does not mean that an inferior combination is inapt for obviousness

purposes.” *In re Mouttet*, 686 F.3d 1322, 1334 (Fed. Cir. 2012). Combining the known coatings containing flavors with the known cereal pieces containing encapsulated flavors for the predictable result of providing a combination of flavors in different parts of a food product would have been obvious to one of ordinary skill in the art. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). We further note that it can hardly be disputed that it is known to coat cooked food products, such as frosting baked cakes, cookies, or cereal pieces (e.g., frosted corn flakes), and it would have been obvious that if the coating is not subjected to high heat, there is no need to encapsulate the flavor to heat stabilize it.

Appellants further find fault with the Examiner’s determination that it would have been obvious to use a flavored syrup coating that has a different flavor than the flavor capsules distributed throughout the cereal piece (Br. 13; Ans. 16; Reply Br. iv). However, this argument has little merit. The Examiners obviousness rationale is based upon the finding that the ordinary artisan would have chosen the flavors contingent upon the desired taste and flavor combination of the cereal piece (Ans. 16). The Examiner’s rationale is reasonable. It can hardly be said that it was not known in the food art to coat a food product to add an additional flavor. Le, for instance, coats Kix<sup>®</sup> cereal with a strawberry or honey flavored syrup. The underlying cereal does not have a strawberry or honey flavor. Clearly, the coating is intended to give the outside of the cereal a different flavor than the inside. Selecting an encapsulated flavor to be mixed within the bulk food product that is

different from the flavor within the coating flows from the teachings of the references and what is known in the art.

*Rejection over Wampler and Lyall*

With respect to the rejection of claims 1 and 10 over Wampler and Lyall, the Examiner finds that Lyall teaches applying a syrupy emulsion with a flavoring such as honey onto extruded cereal pieces (Ans. 7). The Examiner concludes that it would have been obvious to one of ordinary skill in the art to have coated the flavored syrupy emulsion of Lyall onto the cereal pieces of Wampler (Ans. 7).

Appellants contend that there would have been no reason to combine a coating comprising non-encapsulated flavors with cereal pieces comprising encapsulated flavor particles because Wampler teaches away from incorporating non-encapsulated flavors into coatings (Br. 15). However, as we discussed above, even if Wampler taught away from incorporating non-encapsulated flavor into a coating on cereal pieces, it would be of no moment because the claims do not exclude encapsulating the flavor used in the coating. Moreover, the fact that Wampler discloses an embodiment in which liquid flavor capsules are sprayed onto food products like cereal does not amount to a teaching away from using a coating such as that disclosed by Lyall, which was also known to improve the palatability, flavor and texture of the cereal (Lyall, col. 1, ll. 22-24; col. 2, ll. 3-6; col. 3, ll. 5-7). The prior art provides evidence that coatings with non-encapsulated flavor were known as were cereal pieces containing encapsulated flavor. Using them together to obtain the predictable result of providing the known taste and texture effects of the coating on a cereal with the known effects of heat-

stabilizing the flavor within the cereal pieces would have been obvious to one of ordinary skill in the art.

*Rejection over Wampler, Lyall, and Weinstein*

Turning to the rejection of claim 16 in which the Examiner added Weinstein as evidence of obviousness, Appellants do not set forth any arguments that raise issues not already addressed above, and, therefore, Appellants have not identified a reversible error in the Examiner's rejection of claim 16 over Wampler, Lyall, and Weinstein.

**CONCLUSION**

We sustain the Examiner's rejections

**DECISION**

The Examiner's decision is affirmed.

**TIME PERIOD FOR RESPONSE**

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

**AFFIRMED**

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