

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte PAUL MIKOTA,
WILLIAM MICHAEL MACINNES,
BIRGIT SIEVERT, and
MARTIN MICHEL

Appeal No. 2006-2809
Application No. 10/867,713

ON BRIEF

Before GRIMES, LINCK, and LEBOVITZ, Administrative Patent Judges.

GRIMES, Administrative Patent Judge.

DECISION ON APPEAL

This appeal involves claims to a powdered mousse mix and a method of making a mousse. The examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 134. We reverse the pending rejections and enter a new ground of rejection.

Background

A “mousse” can be defined as “a relatively light product (i.e. light in relation to the food) having a spongy or foam structure and consisting of an aerated food such that it contains a large number of cells which can communicate with one another (open cells)

or are separated from one another (closed cells), those cells being formed by air bubbles in the food.” Menzi,¹ col. 1, lines 9-15. The specification states that “the viscosity of the obtained mousse . . . may range from a firm mousse to a foamy slurry.” Pages 3-4.

The specification defines “powdered mousse mix” as “a powdered food mix suitable for the instant reconstitution of a mousse by simple contacting with a liquid and gentle stirring.” Page 3. The specification states that “gentle stirring” means “that after contacting with a liquid, the obtained mixture is simply stirred and intimately mixed thanks to a soft, slow, continuous and uniform movement.” Id.

The specification describes “a powdered mousse mix comprising a source of carbohydrate, a source of protein, a source of fat and particles of a gas generating ingredient.” Page 2. The particles of gas generating ingredient comprise “a matrix containing carbohydrate and protein and entrapped gas under pressure, . . . the gas being present in an amount to release at least 1 ml of gas per gram of gas generating ingredient at ambient conditions upon contacting with a liquid.” Id. The specification also describes a method for reconstituting a mousse by “gently and shortly” stirring the powdered mousse mix with a liquid. Pages 2-3.

Discussion

1. Claim construction

Claims 1-25 are pending and on appeal. We will focus on claims 1 and 24, which are representative and read as follows:

¹ Menzi et al., U.S. Patent No. 4,244,982, issued January 13, 1981.

1. A powdered mousse mix comprising a source of carbohydrate, a source of protein, a source of fat and particles of a gas-generating ingredient comprising a carbohydrate and protein matrix that contains entrapped gas in an amount that can release at least 1 ml of gas per gram of gas-generating ingredient at ambient conditions upon contacting with a liquid.

24. A method of making a mousse without excessive or extensive stirring, which comprises adding a gas-generating ingredient in a powdered food mix containing a source of proteins, a source of carbohydrates and a source of fat, with the gas-generating ingredient comprising a carbohydrate and protein matrix that contains entrapped gas in an amount that can release at least 1 ml of gas per gram of gas-generating ingredient at ambient conditions upon contacting with a liquid, and then reconstituting the mousse by adding the resulting powdered food mix to a liquid with gentle stirring.

Thus, claim 1 is directed to a powder comprising carbohydrate, protein, fat, and a gas-generating ingredient. The gas-generating ingredient comprises a carbohydrate and protein matrix that contains entrapped gas in an amount that can release at least 1 ml of gas per gram of gas-generating ingredient. The powder is capable of forming a mousse by being contacted with a liquid and gently stirred. Specification, page 3.

Claim 24 is directed to a method of making a mousse comprising adding a powder like that defined in claim 1 to a liquid and gently stirring. Gentle stirring refers to “stirr[ing] and intimately mix[ing] thanks to a soft, slow, continuous and uniform movement.” Specification, page 3.

We understand that those skilled in the art interpret a “mousse” to mean a relatively light food product having a spongy or foam structure containing air bubbles. See Menzi, col. 1, lines 9-15. The mousse may have a viscosity ranging “from a firm mousse to a foamy slurry.” Specification, pages 3-4.

2. Pending Rejections

The examiner has rejected claims 1-11, 19, 21, 22, 24, and 25 under 35 U.S.C. § 103 as obvious over Cameron² in view of Bisperink.³ The examiner states that “Cameron discloses a powdered mix for producing an aerated confection comprising a source of carbohydrate, a source of protein, and a source of fat (column 1, lines 20-39) but does not disclose a gas-generating ingredient.” Examiner’s Answer, page 3.

In addition, the examiner states that “Bisperink discloses a gas-generating ingredient that generates a volume of gas of 5 to 30 mL/g of gas-generating ingredient when contacted with a liquid (paragraph 11), comprising a carbohydrate and protein matrix . . . (abstract). Bisperink discloses the use of the gas-generating ingredient in powdered mixes such as creamers (paragraph 24), milkshake powders, soup powders, sauce powders, etc. (paragraph 28).” Id., pages 3-4. In addition, the examiner argues that “Bisperink discloses the inclusion of a gas-generating ingredient in powdered mixes to create aeration.” Id., page 8.

The examiner concludes that it would have been obvious to “include the gas-generating ingredient of Bisperink in the powdered mix of Cameron in order to create an aerated confection that is light, fluffy, and stable.” Id., page 4. In particular, the examiner argues that “it would be obvious to include such an ingredient in any powdered mix, including a powdered mousse mix, when aeration is desired in the final product.” Id., page 8.

² Cameron et al., U.S. Patent No. 2,913,342, issued November 17, 1959.

³ Bisperink et al., European Patent Application No. 1 074 181 A1, published February 7, 2001.

Appellants argue that “because *Cameron* and *Bisperink* are directed towards completely unrelated inventions with different objectives, one having ordinary skill in the art would not be motivated to modify or combine them to arrive at the present claims.” Appeal Brief, page 10. In particular, Appellants argue that Cameron’s “whipped topping requires whipping with a mechanical whipper. . . . In contrast, the claimed compositions and methods can produce a mousse with only a gentle stirring. . . . In addition, other powdered compositions of *Cameron* are specifically stated to be used as ingredients for baked goods and generally for other food products, which also teaches away from the present claims.” Id. Appellants also argue that

Bisperink is primarily directed to a foaming creamer ingredient primarily intended for preparing beverages such as milk shakes and cappuccino coffee, which teaches away from being combined with the solid food applications of *Cameron*. Although the ingredient is said to contain entrapped gas, *Bisperink* is specifically directed to a composition that produces a quality of foam that is “light and fluffy” on the surface of a beverage. . . . [O]ne having ordinary skill in the art would not expect that a creamer ingredient designed to produce a light and fluffy foam on a beverage would also be effectively combined with the powdered fat composition as taught by *Cameron*, which requires whipping to produce a whipped cream and can be used for baking and other solid foods. As a result, there is no direction provided in the cited references suggesting how they should be combined to obtain the present claims.

Id., page 11. Appellants argue that “it is only with a hindsight reconstruction of Appellants’ present claims that the Patent Office is able to even attempt to piece together a rejection of the claims.” Id., page 12. Finally, Appellants argue that “there is no reasonable expectation of success that the combination of the creamer ingredient of *Bisperink* and the powdered fat composition of *Cameron* could result in the claimed invention.” Reply Brief, pages 2-3.

We agree with Appellants that the examiner has not set forth a prima facie case of obviousness. Cameron describes powdered compositions containing fat, protein, and carbohydrate. Col. 1, lines 20-35. Cameron states that the compositions can be used in various food products such as cakes, toppings, or spreads. Col. 3, lines 34-38. In particular, Cameron describes their use in forming whipped toppings. Col. 3, lines 20-26.

Bisperink discloses a powdered ingredient comprising a matrix containing carbohydrate and protein and entrapped gas. Page 2, lines 31-33. Bisperink describes adding this gas-entrapped matrix, i.e., the gas-generating ingredient, to a powder to form foam on the surface of a beverage or other liquid. Page 2, lines 21-22 and 31-36; page 4, lines 30-56. We agree with Appellants that the examiner has not shown that one of ordinary skill in the art would have been motivated, at the time of the invention, to include the gas-generating ingredient of Bisperink in the powdered composition of Cameron. In particular, neither Cameron nor Bisperink discloses or suggests that adding Bisperink's gas-generating ingredient to a topping would be useful in forming a whipped topping.

The examiner argues that incorporation of the gas-generating ingredient would negate the need to whip the topping with a mechanical whipper. Examiner's Answer, page 8. However, the examiner has pointed to no teaching in either Cameron or Bisperink to show that this would be the case. We do not agree that the teaching in Bisperink of using a gas-generating ingredient to form foam on the surface of a liquid, specifically coffee, suggests that this ingredient can be used to produce the effect of a whipped topping without having to whip the topping. Instead, it is the present

specification that discloses that incorporation of the gas-generating ingredient would negate the need to whip the topping with a mechanical whipper. As noted by Appellants, it is impermissible to rely on the specification to provide the motivation to combine the references. In re Gorman, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991).

We therefore conclude that the examiner has not set forth a prima facie case that one of ordinary skill in the art would have been motivated to include the gas-generating ingredient of Bisperink in the powdered compositions of Cameron. Thus, we reverse the rejection of claims 1-11, 19, 21, 22, 24, and 25 under 35 U.S.C. § 103.

The examiner has also rejected claims 12-15 under 35 U.S.C. § 103 as obvious over Cameron in view of Bisperink and Menzi, and has rejected claims 16-18, 20, and 23 under 35 U.S.C. § 103 as obvious over Cameron in view of Bisperink and De Brou.⁴ Claims 12-18, 20, and 23 depend from claim 1. We have already concluded that the examiner has not set forth a prima facie case that claim 1 would have been obvious over Cameron and Bisperink. The examiner relies on Menzi and De Brou for limitations recited in dependent claims, and has not pointed to any disclosure in these references that would make up for the deficiencies discussed above. Thus, we conclude that the examiner has not set forth a prima facie case that claims 12-18, 20, and 23 would have been obvious. We therefore reverse the rejections of these claims under 35 U.S.C. § 103.

⁴ De Brou et al., U.S. Patent No. 3,930,052, issued December 30, 1975.

2. New Rejection

Under the provisions of 37 CFR § 41.50(b), we enter the following new ground of rejection: claims 1 and 24 are rejected under 35 U.S.C. § 102(b) as anticipated by Bisperink.

Bisperink describes a gas-generating ingredient comprising a carbohydrate and protein matrix that contains entrapped gas in an amount that can release at least 1 ml of gas per gram of gas-generating ingredient at ambient conditions upon contact with a liquid. Abstract. Bisperink describes combining this ingredient with a soluble creamer base to form a soluble creamer powder. Page 4, lines 3-5. Bisperink discloses that suitable creamer bases are disclosed in European Patent Applications Nos. 0154192, 0458310, and 0885566. Page 4, lines 7-8. Kuypers⁵ is a U.S. counterpart of EP 0154192. As demonstrated in Kuypers, a typical creamer base contains carbohydrate, protein, and fat. Abstract. Thus, Bisperink describes a powdered composition comprising carbohydrate, protein, fat, and the gas-generating ingredient. Bisperink does not identify this powdered composition as a mousse mix. However, because the soluble creamer powder of Bisperink contains all of the components recited in claim 1, it appears that this powder would be capable of forming a mousse by being contacted with a liquid and gently stirred. Specification, page 3. Thus, Bisperink reasonably appears to disclose a powder that anticipates claim 1.

As discussed above, Bisperink describes adding the gas-generating ingredient to a powdered food mix containing protein, carbohydrate, and fat. Page 4, lines 3-8. Bisperink also describes adding the resulting powder to a liquid with gentle stirring to

⁵ Kuypers, U.S. Patent No. 4,746,527, issued May 24, 1988.

from “a light, fluffy and stable foam.” Page 4, lines 37-40. Bisperink does not identify the resulting foam as a mousse. However, Bisperink’s foam appears to be a mousse as the term is used in the specification (pages 3-4). Thus, Bisperink reasonably appears to anticipate claim 24.

In responding to the pending rejections, Appellants argue that “*Bisperink* is directed to a composition that produces a quality of foam that is ‘light and fluffy’ on the surface of a beverage. . . . [O]ne skilled in the art would understand the lighter and fluffier foam on a beverage is distinguishable from a stable, solid mousse made by the present claims.” Appeal Brief, page 12. We are not persuaded by this argument.

Appellants have not provided any evidence that the term “mousse” does not encompass the type of foam generated by Bisperink. The specification states that “the viscosity of the obtained mousse . . . may range from a firm mousse to a foamy slurry.” Pages 3-4. This broad description of the mousse appears to encompass the foam described in Bisperink. Thus, we conclude that Bisperink describes a mousse, as the term is used in Appellants’ specification.

In addition, Appellants’ argument does not appear to address claim 1, which is directed to a “powdered mousse mix,” not to a mousse. Even if the technique described in Bisperink did not form a mousse, the powder described in Bisperink would still appear to be capable of forming a mousse by being contacted with a liquid and gently stirred, and therefore qualify as a “powdered mousse mix.” Specification, page 3.

Other Issues

We have only applied the new ground of rejection to independent claims 1 and 24. The examiner is more familiar with this art, and should consider whether any of the

dependent claims are anticipated or would have been obvious over Bisperink, alone or in view of any secondary references. If the examiner concludes that additional claims are unpatentable, an appropriate rejection should be entered.

Summary

We reverse the examiner's rejection and enter a new anticipation rejection of independent claims 1 and 24.

Time Period for Response

This decision contains a new ground of rejection pursuant to 37 CFR § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 CFR § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

REVERSED, 37 CFR § 41.50(b)

ERIC GRIMES)
Administrative Patent Judge)
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) BOARD OF PATENT
NANCY J. LINCK)
Administrative Patent Judge) APPEALS AND
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) INTERFERENCES
)
RICHARD M. LEBOVITZ)
Administrative Patent Judge)

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BELL BOYD & LLOYD LLC
P.O. BOX 1135
CHICAGO, IL 60690-1135