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**Datasheet for the decision
of 21 April 2010**

Case Number: T 1964/07 - 3.3.09

Application Number: 01310300.7

Publication Number: 1214885

IPC: A23C 19/082

Language of the proceedings: EN

Title of invention:

Method for preparing cheese products and process cheese bases

Applicant:

Kraft Foods Global Brands LLC

Opponent:

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Headword:

-

Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 84

Keyword:

"Clarity - no"

Decisions cited:

-

Catchword:

-



Case Number: T 1964/07 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 21 April 2010

Appellant: Kraft Foods Global Brands LLC
Three Lakes Drive
Northfield, IL 60093 (US)

Representative: Smaggasgale, Gillian Helen
W.P. Thompson & Co
55 Drury Lane
London WC2B 5SQ (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 26 April 2007
refusing European application No. 01310300.7
pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: W. Sieber
Members: J. Jardón Álvarez
W. Sekretaruk

Summary of Facts and Submissions

I. This appeal lies from the decision of the examining division, dated 26 April 2007, refusing European patent application 01 310 300.7, published as EP 1 214 885 A2. The application has the title "Method for preparing cheese products and process cheese bases".

II. The decision under appeal was based on a set of fourteen claims filed with the letter dated 10 November 2006. Independent Claims 1 and 2 read as follows:

"1. A method for preparing a cheese product comprising:

(1) mixing one or more concentrated powders derived from milk with sodium chloride, milk fat, water, and, optionally, an edible acid and a preservative for a period of time sufficient to produce a mixed product, wherein the concentrated powders are present in an amount ranging from 30 to 55 percent, wherein the sodium chloride is present in an amount ranging from 0.5 to 4.0 percent, wherein the milk fat is present in an amount ranging from 9 to 38 percent, wherein the edible acid is present in an amount ranging from 0 to 2.0 percent, wherein the preservative is present in an amount ranging from 0.0 to 0.2 percent, wherein the water is present at a level sufficient to form the cheese product, wherein percentages are based on the total weight of the cheese product, and wherein the milk fat during mixing is at a temperature of 95°F to 140°F [35.0°C to 60°C]; and

(2) cooling the mixed product for a time and at a temperature which is sufficient to allow the mixed product to form a solid matrix, wherein the solid matrix is the cheese product:

wherein the cheese product has the texture and consistency of fresh cheese.

2. A method for preparing a process cheese base comprising:

(1) mixing one or more concentrated powders derived from milk with sodium chloride, milk fat, water, and, optionally, an edible acid and a preservative for a period of time sufficient to produce a mixed product, wherein the concentrated powders are present in an amount ranging from 30 to 55 percent, wherein the sodium chloride is present in an amount ranging from 0.5 to 4.0 percent, wherein the milk fat is present in an amount ranging from 9 to 38 percent, wherein the edible acid is present in an amount ranging from 0.0 to 2.0 percent, wherein the preservative is present in an amount ranging from 0.0 to 0.2 percent, wherein the water is present at a level sufficient to form the process cheese base, wherein percentages are based on the total weight of the process cheese base, and wherein the milk fat during mixing is at a temperature of 95°F to 140°F [35.0°C to 60.0°C]; and

(2) cooling the mixed product for a time and at a temperature which is sufficient to allow the mixed product to form a solid matrix that is capable of being ground by a cheese grinding system, wherein the solid matrix is the process cheese base;

wherein the process cheese base is suitable to be employed as a substitute for some or all of the natural cheese in a process for producing process cheese."

Claims 3 to 14 were dependent claims.

III. The examining division refused the application because the subject-matter of Claims 1 and 2 did not meet the requirements of Article 56 EPC having regard to the disclosure of document:

D1: EP 0 765 608 A2.

As regards the feature "wherein the milk fat during mixing is at a temperature of 95°F to 140°F [35.0°C to 60°C]" the examining division had objected during examination that this temperature range appeared to be inconsistent with the temperature range of 23.9°C to 32.2°C, at which the ingredients should be mixed (page 12 of the description as filed), and the actual mixing temperature of 28.9°C in the example (page 15). In its reply dated 20 July 2005, the applicant had stated: "... that the claimed mixing temperatures relate to the temperature of the milk fat only during mixing, whereas the mixing temperatures given on pages 12 and 15 provide the mixing temperature for the overall mixture." However, the examining division found it not credible that one component of the mixture, namely the milk fat, could have a temperature different from the overall mixture and chose to interpret the feature in Claims 1 and 2 to the effect that the overall mixture had to have a temperature of 35°C to 60°C.

On this assumption, the examining division concluded that the subject-matter of Claim 1 lacked inventive step having regard to the teaching of D1.

IV. On 21 June 2007 the applicant (appellant) filed a notice of appeal and paid the appeal fee on the same day. The statement setting out the grounds of appeal

was filed on 29 August 2007. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims attached to the appealed decision, that is to say Claims 1 to 14 filed with letter of 10 November 2006.

According to the appellant, the examining division's analysis of D1 was wrong. In fact, there was nothing in D1 that would lead the skilled person to the claimed subject-matter.

- V. On 4 December 2009 the board dispatched the summons to attend oral proceedings on 21 April 2010. In the annexed communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal, the board expressed its preliminary opinion on the case. In the communication the board noted, *inter alia*, that the feature "the milk fat during mixing is at a temperature of 35.0°C to 60°C" was not entirely clear and asked the appellant to clarify this feature.
- VI. On 21 April 2010, oral proceedings were held before the board, at which the appellant, as announced by letter dated 14 April 2010, was not represented.

Reasons for the Decision

1. The appeal is admissible.
2. *Clarity (Article 84 EPC 1973)*
 - 2.1 Claim 1 is directed to a method for preparing a cheese product comprising the following features:
 - (1) mixing one or more concentrated powders derived from milk with sodium chloride, milk fat, water, and optionally, further components for a period of time to produce a mixed product wherein
 - (1a) the concentrated powders are present in an amount of 30 to 55 percent (based on the total weight of the cheese product),
 - (1b) the sodium chloride is present in an amount of 0.5 to 4.0 percent,
 - (1c) the milk fat is present in an amount of 9 to 38 percent, and
 - (1d) the water is present at a level sufficient to form the cheese product, and
 - (1e) wherein the milk fat during mixing is at a temperature of 35.0 to 60°C; and
 - (2) cooling the mixed product for a time and at a temperature which is sufficient to allow the mixed product to form a solid matrix, wherein the solid matrix is the cheese product;
 - (3) wherein the cheese product has the texture and consistency of fresh cheese.
 - 2.2 Concerning feature (1e), this feature requires that "the milk fat during mixing is at a temperature of 35.0°C to 60°C". The temperature of the other

ingredients during mixing is not specified in the claim but it is disclosed in the application as filed that the temperature at which the ingredients should be mixed generally ranges from about 23.9°C to about 32.2°C, preferably from about 23.9°C to about 29.4°C, with about 26.7°C being most preferred (see page 12, lines 9-12 of the application as filed). In the only example of the application "the temperature during mixing was about 28.9°C" and there is no indication in the example that the milk fat during mixing was at a different temperature.

- 2.3 If the mixing is carried out at a temperature of from 23.9°C to about 32.2°C as indicated in the description, all the components of the mixture will adopt this mixing temperature. However, Claim 1 requires for the milk fat a higher temperature, namely 35°C to 60°C. As already pointed out in the decision under appeal (point III above), it is simply not credible that during mixing a single ingredient (here the milk fat) has a temperature different from the other ingredients of the mixture. The examining division therefore assumed that the overall mixture has a temperature of 35°C to 60°C.

Thus, there is an inconsistency as regards the temperature range of the milk fat in Claim 1 and in the description.

- 2.4 When the board took up this point in its communication and indicated that further clarification was necessary, the appellant did not file any response.

There is nothing in the statement of grounds either which could help in understanding this discrepancy. Even the only two passages which are at least *prima facie* related to this issue do not go to the root of the matter. These passages read as follows:

- "4. It is an essential feature of Claim 1 that the temperature at which the milk fat is held during mixing is from 35°C to 60°C. Since D1 discloses a heating above 60°C it is immediately apparent that the disclosure of D1 is of a heating profile which is outside the range defined in Claim 1.
5. Even if the Examiner's analysis of the temperature given in Claim 1 as being the temperature of the mixture is accepted, the Examining Division's analysis of the heating profile of D1 is fundamentally flawed as illustrated above."

2.5 It follows from the above that there is a discrepancy between the temperature indicated in feature (1e) of Claim 1 and the temperature indicated in the description. For this reason the subject-matter of Claim 1, and, by the same token, the subject-matter of Claim 2 does not meet the requirements of Article 84 EPC 1973.

2.6 The objection under Article 84 EPC 1973 alone justifies the refusal of the only request of the appellant. Consequently, there is no need for the board to consider in its decision the other issues raised.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Röhn

W. Sieber