

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

KRAFT FOODS GLOBAL, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:10-cv-8006
)	
DAIRILEAN, INC.,)	Jury Trial Demanded
)	
Defendant.)	

PLAINTIFF KRAFT FOODS GLOBAL, INC.’S AMENDED COMPLAINT

Introduction

1. This is an action for a declaratory judgment of non-infringement and invalidity by Plaintiff Kraft Foods Global, Inc. (“Kraft”) of several United States Patents owned by Defendant Dairilean, Inc. (“Dairilean”).

The Parties

2. Plaintiff Kraft Foods Global, Inc., a Delaware corporation with its principal place of business located at Three Lakes Drive, Northfield, IL 60093, is the world’s second largest food company.

3. Defendant Dairilean, Inc. is a corporation organized and existing under the laws of the State of South Dakota, having its principal place of business in Harrisburg, South Dakota.

The Nature of the Action

4. This is an action for Declaratory Judgment of non-infringement, invalidity, and/or unenforceability as to three patents, all of which are owned by Dairilean, under 35 U.S.C. §§ 101, 102, 103, 112, and 271. The patents-at-issue are U.S. Patent Nos. 5,352,468 (“the ’468 Patent”); 6,251,459 (“the ’459 Patent”); and 6,465,030 (“the ’030 Patent”), collectively the “Dairilean Patents.” Copies of the Dairilean Patents are attached as Exhibits A-C, respectively.

Jurisdiction and Venue

5. This action arises under the laws of the United States, specifically Title 35 of the United States Code. This Court therefore has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a). Further, because this action presents an actual controversy with respect to the invalidity, non-infringement, and/or unenforceability of the patents-in-suit, the Court may grant the declaratory relief sought pursuant to 28 U.S.C. §§ 2201 and 2202.

6. Venue properly lies in this district pursuant to 28 U.S.C. §§ 1391(b) and 1391(c). Dairilean is subject to personal jurisdiction in this judicial district. Dairilean has had systematic and not isolated activities in this judicial district.

7. Moreover, Dairilean has purposefully directed activities relating to the Dairilean Patents to residents of Illinois. On information and belief:

- From at least 1992 until 2002, the Dairilean Patents were prosecuted on Dairilean's behalf by multiple different law firms located in Chicago, Illinois.
- In 2008, over a period of about five months, a Chicago, Illinois attorney representing Dairilean contacted a Chicago, Illinois attorney representing Kraft, offering to sell the Dairilean Patents to Kraft.
- In 2010, an attorney representing Dairilean contacted Kraft in Illinois within this judicial district regarding potential licensing and enforcement of the Dairilean Patents.
- Dairilean has made deliberate attempts to market and test products that embody the Dairilean Patents in the upper Midwest (which includes Illinois) through an arrangement with Dean Foods.

Actual Case or Controversy

8. Kraft makes and sells a wide variety of cheese products, including Cheez Whiz®, Easy Cheese®, Kraft Singles, Kraft Macaroni & Cheese Deluxe, and Velveeta® branded products (collectively, the “Kraft Products”). Kraft and its predecessors have a long history of making and selling each of the Kraft Products. For example, since as early as 1928, Velveeta® products have been made and sold by Kraft and its predecessors; since as early as 1952, Cheez Whiz® has been made and sold by Kraft and its predecessors; since as early as 1952, Kraft Singles has been made and sold by Kraft and its predecessors; and since as early as 1965 Kraft Macaroni & Cheese Deluxe has been made and sold by Kraft and its predecessors. Kraft sells each of the Kraft Products in this judicial district.

9. On or about June 18, 2008, Dairilean, through its Chicago, Illinois counsel, called Kraft, through its Chicago, Illinois counsel, seeking Kraft’s interest in purchasing the Dairilean Patents. Dairilean also indicated its view that the Dairilean Patents relate to Kraft’s Velveeta products. Dairilean further indicated that it was talking with other companies regarding the sale of the Dairilean Patents, including a patent enforcement group.

10. On or about October 7, 2008, after further communications with Dairilean’s counsel over the preceding months, Kraft declined to purchase the Dairilean Patents, stating “Kraft has determined that [the Dairilean Patents] do not align with its current business and technical interests.”

11. On or about November 1, 2010, Dairilean’s patent litigation counsel from the law firm Collins, Edmonds & Pogorzelski with offices in Longview and Houston, Texas sent a letter to Kraft’s headquarters in Northfield, Illinois.

12. Dairilean's November 1, 2010 letter purports to compare "exemplary" claims 1 and 13 of the '468 Patent to the ingredients of an "exemplary Velveeta product." Dairilean's letter concluded that "[b]ased upon the foregoing analysis, Dairilean believes that Kraft has needed and still needs a license to at least the '468 Patent."

13. In Dairilean's November 1, 2010 letter, it further noted that "Kraft should be aware that Dairilean [is] also the owner and assignee of U.S. Patent Nos. 6,465,030 and 6,251,459" and that "the '030 and '459 Patents .. are available for license, and Kraft may find them valuable based upon its current products or future plans."

14. The '459 and '030 Patents are related to the '468 Patent and part of the same patent family as the '468 Patent. The '459 and '030 Patents share the same inventor, share a similar specification, and cover similar technology as the '468 Patent.

15. While Dairilean's November 1, 2010 letter only referenced the Velveeta® products, its April 18, 2011 Counterclaims alleged infringement of the Kraft Products defined herein.

16. Kraft desires to make and sell the Kraft Products free from the specter of Dairilean's allegations of infringement of the Dairilean Patents. Although Dairilean's November 1, 2010 letter was addressed to "Kraft Foods, Inc.," that is not the entity that makes and sells the Kraft Products. Instead, the Kraft Products are made and sold by the Plaintiff Kraft Foods Global, Inc. Hence, Kraft Foods Global, Inc. is the entity with the actual case or controversy.

17. Therefore, an actual controversy exists between Kraft and Dairilean with respect to the invalidity, non-infringement, and/or unenforceability of the Dairilean Patents. Accordingly, Kraft reasonably believes that, under all the circumstances, there is a substantial

controversy between Kraft and Dairilean of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

COUNT I

Declaratory Judgment of Non-Infringement of the Dairilean Patents

18. Kraft repeats and realleges the allegations contained in preceding paragraphs 1-17, inclusive, as if fully set forth herein.

19. On October 4, 1994, United States Patent No. 5,352,468 entitled “Process Concentrate and Dairy [sic] Products” was issued. A copy of the ’468 Patent is attached as Exhibit A.

20. On June 26, 2001, United States Patent No. 6,251,459 entitled “Dairy Product and Method” was issued. A copy of the ’459 Patent is attached as Exhibit B.

21. On October 15, 2002, United States Patent No. 6,465,030 entitled “Process Concentrate and Dairy Products” was issued. A copy of the ’030 Patent is attached as Exhibit C.

22. The named inventor of each of the Dairilean Patents is Bruce G. Schroder.

23. Dairilean purports to own each of the Dairilean Patents.

24. The Kraft Products and the processes used to make the Kraft Products do not infringe the Dairilean Patents.

25. As a consequence of the foregoing, there is an actual and justiciable controversy between Kraft and Dairilean over the non-infringement of the Dairilean Patents, with respect to which Kraft is entitled to a declaratory judgment in its favor.

COUNT II

Declaratory Judgment of Invalidity of the Dairilean Patents

26. Kraft repeats and realleges the allegations contained in preceding paragraphs 1-25, inclusive, as if fully set forth herein.

27. Each of the Dairilean Patents is invalid under one or more provisions of Title 35 of the United States Code, including the provisions of 35 U.S.C. §§ 102, 103, and 112.

28. As a consequence of the foregoing, there is an actual and justiciable controversy between Kraft and Dairilean over the invalidity of the Dairilean Patents, with respect to which Kraft is entitled to a declaratory judgment in its favor.

COUNT III

Declaratory Judgment of Unenforceability of the Dairilean Patents

29. Kraft repeats and realleges the allegations contained in preceding paragraphs 1-28, inclusive, as if fully set forth herein.

30. The Dairilean Patents purport to disclose the filtering of whey or milk through a process of ultrafiltration to obtain a retentate (the portion that did not pass through the filter) and a permeate (the portion that did pass through the filter). The Dairilean Patents purport to claim using either the retentate, the permeate, or both to create a dairy product through the addition of at least a preservative, and in some cases, an acid. The Dairilean Patents purport to claim this dairy product can be among other things, a beverage.

31. On information and belief, at least Bruce G. Schroder, registered patent attorney Patrick Ertel, registered patent attorney Richard Phillips, and registered patent attorney Steven Sucar were substantially involved in the prosecution of the '468 Patent, and each had a duty to disclose material prior art to the United States Patent and Trademark Office pursuant to 37 C.F.R. § 1.56 during the course of the prosecution of the '468 Patent.

32. On information and belief, at least Bruce G. Schroder, registered patent attorney Patrick Ertel, registered patent attorney Richard Phillips, registered patent attorney Steven Sucar, and registered patent attorney Peter Trzyna were substantially involved in the prosecution of the '459 Patent, and each had a duty to disclose material prior art to the United States Patent and Trademark Office pursuant to 37 C.F.R. § 1.56 during the course of the prosecution of the '459 Patent.

33. On information and belief, at least Bruce G. Schroder and registered patent attorney Peter Trzyna were substantially involved in the prosecution of the '030 Patent, and each had a duty to disclose material prior art to the United States Patent and Trademark Office pursuant to 37 C.F.R. § 1.56 during the course of the prosecution of the '030 Patent.

34. During the prosecution of the '468 Patent, on or about December 30, 1992, Bruce Schroder's patent attorney, Patrick Ertel, submitted an Information Disclosure Statement under 37 C.F.R. § 1.97. In that statement, the applicant stated:

A study was conducted using a permeate-containing drink more than one year before the filing date of the above-identified application. The drink was made by mixing a high water content permeate and 100% of the preservative that was to be present in the drink. From the study, it was discovered, among other things, that the preservative did not come out of solution at room temperature.

While it is believed that this study involved an experimental use, or at a minimum did not involve any use of the presently claimed methods and dairy drinks, applicant stands ready to provide a detailed report on the study if it is believed necessary or advisable by the U.S. Patent and Trademark Office.

35. On information and belief, beyond these four sentences, the applicant made no additional disclosure to the Patent Office regarding this "study," the products used in this "study," or the method used to create the products used in this "study." On information and

belief, the applicant did not submit to the Patent Office any articles, brochures, product labels, or other documentation regarding this “study,” the products used in this “study,” or the method used to create the products used in this “study.”

36. On information and belief, more than one year prior to filing the application for the '468 Patent, Bruce G. Schroder created a product called Espree. Espree was a dairy beverage.

37. On information and belief, Espree was made and subsequently publicly distributed, offered for sale, and sold to the public more than one year prior to filing the application for the '468 Patent through at least:

- a professional focus panel on or about 1988;
- a consumer panel where Espree was compared to leading soft drinks on or about 1988;
- the advertising and public “competitive” sale of the Espree product over a period of at least four months at the Pizza and Pasta outlet located at the Empire Mall in Sioux Falls, South Dakota on or about 1989 to 1990; and
- the advertising and public sale of the Espree product over a period of at least one semester at the Dairy Bar at South Dakota State University on or about 1990.

38. On information and belief, more than one year prior to filing the application for the '468 Patent, Espree was created through the combination of a permeate, a preservative, and an acid. On information and belief, the permeate was made through ultrafiltering whey. On information and belief, the preservative was potassium benzoate, which is a preservative that is effective below a pH of about 7. On information and belief, the acid was citric acid, which is a food grade acid.

39. On information and belief, more than one year prior to filing the application for the '468 Patent, the making of Espree also included a number of additional ingredients that are claimed limitations in the Dairilean Patents, including but not limited to the addition of water, additional preservative, sweeteners, and/or gaseous carbon dioxide.

40. The Espree product, the method of making Espree, and the various public disclosures, distribution, offers for sale, and sales of Espree more than one year prior to filing the application for the '468 Patent (collectively, the "Espree Prior Art") was both material and not cumulative to the information already of record in the Dairilean Patents.

41. The Espree Prior Art is material and not cumulative prior art to the '468 Patent because a reasonable Examiner would find the Espree Prior Art important in determining whether to allow claims 1-15 of the '468 Patent to issue. A reasonable Examiner would find the Espree Prior Art important because it discloses at least the following claim elements of the '468 Patent:

- mixing the dairy base and an aliquot of the total preservative in the dairy product, the dairy base being at least one of a retentate of a dairy starting material, a permeate of a dairy starting material, or dairy water obtained from the dairy starting material, the dairy starting material being selected from the group consisting of milk, defatted mil, whey, defatted whey, retentate and defatted retentate, the preservative being effective at a pH below about 7 (*see, e.g.*, claims 1 and 10);
- reducing the pH of the mixture to a pH at which the preservative is effective using the food grade acid in an amount effective to reduce the pH, the preservative

being present in an amount effective to have a preserving effect on the process concentrate (*see, e.g.*, claims 1, 10, and 13);

- the dairy base is the permeate and the permeate is selected from the group consisting of milk and whey permeate (*see, e.g.*, claim 3);
- mixing additional preservative with water to produce a second homogeneous mixture and mixing the second mixture with the process concentrate to produce the batch concentrate (*see, e.g.*, claims 4 and 10);
- wherein the dairy product is a drink (*see, e.g.*, claim 6);
- reducing the pH of the additional preservative and water mixture to a pH at which the preservative is effective using a food grade acid (*see, e.g.*, claim 11);
- mixing the dairy base with a preservative, the preservative being effective at a pH below about 7 (*see, e.g.*, claim 13); and
- the amount of preservative being mixed is an aliquot of the total amount of preservative in the dairy product (*see, e.g.*, claims 1 and 13).

42. The Espree Prior Art is material and not cumulative prior art to the '468 Patent because it contradicts statements made by the applicant during the prosecution of the '468 Patent. These statements include at least the following:

- “A study was conducted using a permeate-containing drink more than one year before the filing date of the above-identified application.” On information and belief, Espree was subjected to public distribution and public sales more than one-year before the filing date of the '468 Patent;
- “The drink was made by mixing a high water content permeate and 100% of the preservative that was to be present in the drink.” On information and belief, the

Espree product was made with numerous other material ingredients, including for example, a food grade acid. Additionally, on information and belief, for some flavors, such as Limon, the 100% of the preservative to be present in the drink was not added to the permeate.

- “[I]t is believed that this study involved an experimental use.” On information and belief, the public disclosures and public sales of Espree were not used to experiment with any of the claim limitations of the ’468 Patent, but were instead meant to identify consumer taste preferences, potential marketing strategies, and potential price points.
- “Nothing in the cited patents suggest the combinability of a dairy base, preservative and an acid to produce the dairy product.” On information and belief, the Espree Prior Art taught combining a dairy base, a preservative, and an acid to produce the dairy product.
- “[A]bsent Applicant’s own teaching there is no suggestion of using a preservative in a dairy product.” On information and belief, the Espree Prior Art taught using a preservative (namely potassium benzoate, which is disclosed as a preservative in the ’468 Patent) in a dairy product.
- “The Examiner may not use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious. Clearly, without a teaching of the desirability of combining a dairy product with a preservative such a modification is improper.” On information and belief, the Espree Prior Art taught the desirability of combining a dairy product with a preservative.

- “Thus, the Applicant has gone against Gregg’s teaching by diluting 100% of a salt by only introducing an aliquot of the preservative...Thus, the Applicant has also gone against this teaching of Monte by only introducing an aliquot of the preservative in making the process concentrate.” On information and belief, the Espree Prior Art taught, at least for some flavors such as Limon, introducing an aliquot of the preservative in making the process concentrate.
- “Claim 21 depends upon claim 6 and further recites that the method includes the step of mixing additional preservative with the process concentrate. None of the cited references disclose this additional step.” On information and belief, the Espree Prior Art disclosed the step of mixing additional preservative with the process concentrate.

43. The Espree Prior Art is material and not cumulative prior art to the ’459 Patent because a reasonable Examiner would find the Espree Prior Art important in determining whether to allow claims 1-15 of the ’459 Patent to issue. A reasonable Examiner would find the Espree Prior Art important because it discloses at least the following claim elements of the ’459 Patent:

- preservatives (*see, e.g.*, claims 2 and 3);
- acids (*see, e.g.*, claims 2 and 4);
- carbonation (*see, e.g.*, claims 2 and 6);
- sweetening agents (*see, e.g.*, claims 2 and 7);
- vitamins (*see, e.g.*, claims 2 and 8);
- food colorings (*see, e.g.*, claims 2 and 10); and
- flavorants (*see, e.g.*, claims 2 and 11).

44. The Espree Prior Art is material and not cumulative prior art to the '030 Patent because a reasonable Examiner would find the Espree Prior Art important in determining whether to allow claims 1-79 of the '030 Patent to issue. A reasonable Examiner would find the Espree Prior Art important because it discloses at least the following claim elements of the '030 Patent:

- forming a mixture including at least one of the retentate and the permeate, in combination with a preservative and an acid in an amount sufficient to make the preservative effective, to make the dairy product (*see, e.g.*, claim 1);
- producing an acidity of the dairy product greater than an acidity of the milk (*see, e.g.*, claims 2 and 14);
- wherein the step of filtering is carried out through ultrafiltration (*see, e.g.*, claims 6 and 29);
- wherein the step of forming the mixture includes forming the mixture with the permeate but not the retentate (*see, e.g.*, claims 7, 10, 11, 17, 20, 23, 27, 31, 35, 39, 42, 47, 51, 55, 58, 63, 67, and 71);
- making a beverage including the dairy product (*see, e.g.*, claim 37);
- adding a sweetener to the dairy product (*see, e.g.*, claim 49);
- injecting gaseous carbon dioxide (*see, e.g.*, claims 60 and 74);
- filtering a dairy starting material to produce retentate and permeate (*see, e.g.*, claims 61, 65, and 69); and
- using at least one of the retentate and the permeate in combination with a preservative (*see, e.g.*, claims 61, 65, and 69).

45. On information and belief, at least Bruce Schroder knew of the Espree Prior Art during the prosecution of each of the Dairilean Patents. On information and belief, Bruce Schroder was the person responsible for making the Espree products present in the Espree Prior Art. On information and belief, Bruce Schroder was involved in and aware of each of the public disclosures, distributions, offers for sale, and sales of the Espree products present in the Espree Prior Art.

46. On information and belief, at least Bruce Schroder was aware of the materiality of the Espree Prior Art, and failed to disclose the Espree Prior Art with the intent to deceive the United States Patent and Trademark Office.

47. The '468 Patent is unenforceable under the doctrine of inequitable conduct based on the intentionally misleading and substantially incomplete disclosure of the Espree Prior Art in the application for the '468 Patent.

48. The '459 Patent is unenforceable under the doctrine of inequitable conduct based on the inequitable conduct present during the prosecution of the '468 Patent and based on the failure to disclose the Espree Prior Art in the application for the '459 Patent.

49. The '030 Patent is unenforceable under the doctrine of inequitable conduct based on the inequitable conduct present during the prosecution of the '468 and '459 Patents and based on the failure to disclose the Espree Prior Art in the application for the '030 Patent.

50. As a consequence of the foregoing, there is an actual and justiciable controversy between Kraft and Dairilean over the unenforceability of the Dairilean Patents, with respect to which Kraft is entitled to a declaratory judgment in its favor.

Prayer for Relief

WHEREFORE, Kraft respectfully requests the following relief:

- A. the entry of judgment declaring that Kraft's Cheez Whiz®, Easy Cheese®, Kraft Singles, Kraft Macaroni & Cheese Deluxe, and Velveeta® branded products have not infringed any of the Dairilean Patents;
- B. the entry of judgment declaring that each of the Dairilean Patents is invalid;
- C. the entry of judgment declaring that each of the Dairilean Patents is unenforceable;
- D. the entry of judgment declaring this to be an exceptional case pursuant to 35 U.S.C. § 285 and awarding to Kraft its reasonable attorneys' fees expended in bringing and maintaining this action;
- E. an award of Kraft's costs, disbursements, and other expenses; and
- F. an award of such other and further relief as the Court deems just and proper.

Jury Demand

Plaintiff hereby requests a trial by jury on all issues triable by a jury.

Dated this 12th day of May, 2011.

FOLEY & LARDNER LLP

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served via CM/ECF to all counsel of record on May 12, 2011.

/s/ Jason J. Keener

Jason J. Keener