United States District Court,
C.D. California.

ZB INDUSTRIES, INC,
v.
CONAGRA, INC.

No. CV 99-4145-GHK (RCX)

April 20, 2000.

K. Leigh Ray, Deputy Clerk, for Plaintiff.

PROCEEDINGS: Joint Briefing Re: Summary Judgment on Infringement/Noninfringement

KING**, J.**

After considering the parties' briefing filed in support of their respective positions, and after hearing oral argument, we rule as follows:

I. Background

Plaintiff ZB Industries, Inc. ("ZBI") FN1 and Defendants Conagra, Inc., Meridian Seafood Products, Inc., and Ocean Duke Corp. (collectively, "Defendants") market or produce competing products that consist of circular trays containing frozen shrimp surrounding a receptacle for cocktail sauce. ZBI allegedly holds a design patent, United States Patent No. Des. 404,612 ("patent '612") for its design, and claims that Defendants' products are infringing. Pursuant to our December 17, 1999 Order, the parties have filed joint briefing and evidence to cross-move for partial summary judgment, solely on the issue of patent infringement.

FN1. Plaintiff evidently changed its name from ZBI to Contessa Food Products, Inc. during this litigation. The parties' joint briefing refers to Plaintiff as ZBI, and we will follow the parties' practice.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). If the party seeking summary judgment bears the burden of proof on a particular issue at trial, it must produce evidence showing that no reasonable trier of fact could find against it. *See* Calderone v. United States, 799 F.2d 254, 259 (6 th Cir.1986). In

contrast, if the party seeking summary judgment does not bear the burden of proof on a particular issue at trial, it need only point out to the court that its opponent's case lacks essential evidentiary support. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986).

B. Legal Standard for Design Patent Infringement

Design patent infringement is a factual question, and the patent holder must prove infringement by a preponderance of the evidence. OddzOn Prods., Inc. v. Just Toys, Inc., 122 F.3d 1396, 1404 (Fed.Cir.1997).

The scope of a design patent's protection is narrow. *See* In re Mann, 861 F.2d 1581, 1582 (Fed.Cir.1988). "A design patent protects the nonfunctional aspects of an ornamental design as shown in the patent." Elmer v. ICC Fabricating, Inc., 67 F.3d 1571, 1577 (Fed.Cir.1995), *citing* KeyStone Retaining Wall Sys., Inc. v. Westrock, Inc., 997 F.2d 1444, 1450 (Fed.Cir.1993). In fact, "[i]t is legal error to base an infringement finding on features of the commercial embodiment not claimed in the patent." Sun Hill Indus., Inc. v. Easter Unlimited, Inc., 48 F.3d 1193, 1196 (Fed.Cir.1995).

The test for infringement involves two steps: (1) the claim must be construed to determine its meaning and scope; and (2) the claim as properly construed must be compared to the accused design. *Id*.

1. Claim construction

The construction of a design patent is somewhat different from the construction of a utility patent. With a utility patent, the court must " 'arrive[ ] at an understanding of the language as used in the patent and prosecution history." ' Goodyear Tire & Rubber Co., 162 F.3d 1113, 1116 (Fed.Cir.1998), *quoting* Markman v. Westview Instruments, Inc., 52 F.3d 967, 981 (Fed.Cir.1995) (en banc). With a design patent, the process of claim construction "must be adapted to the practice that a patented design is claimed as shown in its drawing. There is usually no description of the design in words [.]" Goodyear, 162 F.3d at 1116, *citing* 37 C .F.R. s. 1.153(a) ("No description, other than a reference to the drawing, is ordinarily required. The claim shall be in formal terms to the ornamental design for the article (specifying name) as shown, or as shown and described. More than one claim is neither required nor permitted.").

In construing a design patent's claim, we should take note of "the ornamental features that produce[ ] the overall ... appearance of the design," thereby limiting "the scope of the patent to its overall ornamental visual impression, rather than to the broader general design concept" of the type of article that the patent represents. OddzOn, 122 F.3d at 1405.

Here, ZBI's '612 patent includes five drawings, which show various perspectives of a circular tray containing shrimp. Jt. Ex. 1. The arrangement of shrimp on the tray is shown in detail in Figures 1-3. Figures 4 and 5 do not show the arrangement of shrimp. Figure 4 shows the underside of the tray and Figure 5 shows a cross-section of the tray, with an outline where the shrimp would be.

Figures 1-3 show that the shrimp are arranged in two concentric circles. Each shrimp nests in the crook of the shrimp next to it, with its head pointed toward a central cup-like receptacle and its tail pointed toward the edge of the tray. The two circles of shrimp overlap each other, so that the hindquarters of the shrimp on the inner, upper circle appear to be resting on the heads of the shrimp in the outer, lower circle. The tail of each shrimp in the outer circle rests against or near the inner surface of the edge of the tray. Viewed from above, as in Figures 1 and 2, the arrangement conveys the impression of a clockwise-turning wheel of overlapping shrimp. Viewed from the side, as in Figure 3, the shrimp form a mound that slopes downward

from the cup-like area toward the edge of the tray.

The underside view of the tray in Figure 4 shows a pattern of concentric circles. The cross section in Figure 5 shows that just outside the lip of the central cup, a short shelf begins. That shelf then drops down to a second, broader shelf. This second shelf slopes downward toward a shallow channel running along the inside edge of the tray. The edge of the tray rises up from this channel and then turns down on its outer side to form a small lip.

In sum, patent '612 claims a tray of a certain design, as shown in Figures 4-5, containing shrimp arranged in a particular fashion, as shown in Figures 1-3.FN2

FN2. At oral argument, Defendants acknowledged that a patent could protect the combination design of a tray containing a particular arrangement of shrimp. *See* Transcript of March 8, 2000 Hearing ("Tr.") 48:8-12. They suggested, however, that an arrangement of shrimp alone could not be the proper subject of a design patent, because the arrangement would not constitute an "article of manufacture" under 35 U.S.C. s. 171. *See* Tr. 18:9-14, 19:1-8. To the extent that Defendants' argument is intended to contest the validity of the '612 patent, it is irrelevant to the present motion; the parties, for whatever reason, agreed to set aside validity and other issues for the time being and argue only the infringement issue. To the extent that Defendants are asserting that we should consider both the arrangement of shrimp and the design of the underlying tray in construing the '612 patent, we agree with them: By its own terms, the '612 patent claims "the ornamental design for a serving tray with shrimp," Jt. Ex. 1, and we must consider the overall ornamental appearance of the design as shown by all five of the patent's figures. *See* Elmer, 67 F.3d at 1577-78; Keystone, 997 F.2d at 1450.

2. Comparison to the Accused Device

The comparison is a two-step process: "The patentee must prove both [1] substantial similarity and [2] appropriation of the 'point of novelty." ' Sun Hill, 48 F.3d at 1197. In other words, to conclude that Defendants' design infringes patent '612, we first must find that the overall appearances of the two designs are substantially similar, and then we must find that the similarities encompass the point or points of novelty that set patent '612 apart from the prior art. *See* Goodyear, 162 F.3d at 1118. We must consider the substantial similarity and point of novelty tests separately. Unidynamics Corp. v. Automatic Prods. Int'l, Ltd., 157 F.3d 1311, 1324 (Fed.Cir.1998).

a. Substantial similarity: Ordinary Observer Test

To conclude that patent '612 and Defendants' designs are substantially similar, we must determine that an ordinary observer would be confused by the similarity of the designs' ornamental features.

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Gorham Co. v. White, 81 U.S. 511, 528 (1871).

The patented and accused designs need not be identical for infringement to occur, OddzOn, 122 F.3d at 1405. Nonetheless, "[d]ifferences in the design are relevant, as well as similarities, in determining whether

[the ordinary observer] would be deceived." Goodyear, 162 F.3d at 1117. "It is the appearance of a design as a whole which is controlling in determining infringement. There can be no infringement based on the similarity of specific features if the overall appearance of the designs are dissimilar[.]" OddzOn, 122 F.3d at 1405.

Defendants' accused products are very similar in overall appearance to patent '612, including the appearance of both the shrimp arrangement and the underlying tray. The parties have submitted photographs of top and bottom views FN3 of several sizes of Defendants' products, marketed under four brand names (Gold Star, Meridian, Black Tie, and Singleton). Jt. Exs. 4-9, 13. The photographs show Defendants' products as they appear for sale: the trays have shrimp on them, and the products are wrapped in plastic for freezer storage.

FN3. The undersides of Defendants' trays actually are not visible in the photographs, because they are covered by the plastic wrapping and a sticker that displays thawing instructions, ingredients, and nutritional information. *See, e.g.,* Jt. Exs. 7, 8, 9.

Although not all of the photographs convey a clear impression of the appearance of Defendants' products,FN4 there is no question that the arrangement of shrimp in Defendants' products is nearly identical to the arrangement shown in patent '612. Each of Defendants' products contains two concentric circles of overlapping shrimp, with their heads pointing toward a central cup of cocktail sauce and their tails abutting or near the outer edge of the tray. *See, e.g.,* Ex. 7 (Black Tie tray). To the extent that it is possible to make out three-dimensional features from the photographs, it appears that Defendants' shrimp, like the '612 shrimp, form a mound that slopes downward toward the tray's outer rim. *See* id.

FN4. For example, frost on the inside or outside of the packaging of Defendants' photographed products sometimes makes it difficult to see to what extent the shrimp overlap. *See, e.g.,* Jt. Ex. 5.

Indeed, Defendants have raised no credible argument that the arrangement of shrimp in their products looks any different from the arrangement shown in patent '612. In their briefing, Defendants state that their shrimp are arranged clockwise while ZBI's are counterclockwise, Jt. Brief at 55, but even if this de minimis alleged difference could have any bearing on the substantial similarity inquiry, the truth is that the shrimp in several of the accused products actually are arranged counterclockwise. *See* Jt. Exs. 5, 7. In oral argument, Defendants contended that there might be a difference in the appearances of the shrimp arrangements only after we suggested that the shrimp on Defendants' trays might drape over each other in a slightly different way from the shrimp shown in patent '612. *See* Transcript of March 8, 2000 Hearing ("Tr.") 46:12-19; 51:16-22. There is no evidence that an ordinary observer would perceive any difference in the draping of the shrimp.

Having all but conceded that the arrangement of shrimp in the competing designs is substantially similar, Defendants emphasize minor structural differences between their *trays* and the tray in patent '612. The parties have submitted a sample of one of Defendants' trays, without shrimp. Jt. Ex. 101. Like the '612 design, Defendants' tray is circular, contains a central cup-like area, an area to rest the shrimp, a shallow channel running near the outside of the tray, and a raised lip at the outer edge. Unlike patent '612, Defendants' tray appears to have only one shelf for the shrimp to rest on; although there is a short ledge between the shelf and the rim of the central cup on Defendants' tray, this ledge is not as broad as the top shelf in the '612 drawings appears to be.

Defendants introduce declarations purporting to point out other structural differences between their trays and the tray shown in patent '612. Robert Anders, a professor of industrial design, points out that the shelf on Defendants' tray is broken into 30 wedge-shaped areas by grooves that radiate out from the center of the tray. *See* Anders Decl. para. 11.01.1. No such grooves appear in the '612 drawings. Anders purports to identify other differences, including: (1) the outer edge of the accused trays extends farther down than the edge of the tray in patent '612; (2) the cup area of the accused trays is proportionately wider than that of patent '612; and (3) the tails of the shrimp touch the outer edge of the tray in the accused designs, while they do not touch the edge in patent '612 .FN5 Id. Based on differences such as these, Anders opines that an ordinary observer would not find the competing designs to be substantially similar. Id.

FN5. In fact, though, it is not possible to conclude from the '612 figures whether the tails of the shrimp touch the rim of the tray or not. *Compare* Jt. Ex. 1 fig. 1 (appearing to show shrimp tails touching rim) *with* fig. 2 (different perspective suggesting that tails do not quite touch rim).

The opinion of a design expert, however, is usually a poor proxy for the view of the ordinary observer, *see* Goodyear, 162 F.3d at 1117, citing Gorham, 81 U.S. at 528, and Anders' declaration in particular has little probative value because he states no factual basis for concluding that an ordinary observer would focus attention on any of the features he emphasizes. Anders simply states that "[i]n forming my opinion, I have considered the nature of an ordinary observer's decision in selecting and choosing frozen shrimp for purchase." *Id*. para. 11.01.2. In fact, though, the grooves on the accused trays would be invisible to a purchaser of the frozen product, because these features would be obscured by the packaging and the shrimp. *See* Jt. Exs. 4-9, 13. More importantly, Anders makes no mention of the arrangement of the shrimp themselves, which is the subject of three of the five figures of patent '612 and surely is the most prominent design feature of the accused products at the point of purchase.

The other declarations offered by Defendants are even less probative of the ordinary observer's viewpoint. Karen Proctor, a professor of packaging science, states that Defendants' tray design "is substantially different from the design of the '612 patent," Proctor Decl. para. 15, but she offers no opinion as to the view of an ordinary observer. Indeed, her declaration barely even addresses the ornamental appearances of the competing designs. Rather, Proctor emphasizes irrelevant matters of functionality, such as the rigidity provided by the grooves in Defendants' trays and the benefits of Defendants' vacuum-packing process. *See* id. para.para. 7-8.

Thawatchal Dumrongsinsawat, one of Defendants' designers, states that he has "observed many differences between" Defendant's tray and patent '612, Dumrongsinsawat Decl. para. 4, but, like Proctor, he offers no opinion as to the view of an ordinary observer. Also like Proctor, Dumrongsinsawat emphasizes functional aspects of the competing trays, including characteristics that simply are not part of the '612 design patent, such as the trays' durability. Id. para. 5.

ZBI has produced the declaration of a consumer analyst, William Tomlinson, which states that an ordinary retail consumer would find one of Defendants' trays to be substantially similar to patent '612. Tomlinson Decl. para. 13. While we do not place great weight on this expert declaration, we note that Tomlinson, unlike Anders, at least provides a foundation for his opinion by explaining why he believes that consumers would be most likely to notice the arrangement of the shrimp rather than features of the underlying tray if he examined Defendants' product in a retail environment. Id. para.para. 8-10.

We conclude that any reasonable finder of fact, applying the ordinary observer test, would find that Defendants' accused products are substantially similar in overall ornamental appearance to the design protected by patent '612. Even if we compared only the competing products' trays, without considering the arrangement of shrimp, we would be hard-pressed to conclude that an ordinary observer would find the products sufficiently dissimilar to prevent a finding of infringement. As a matter of law, however, we must consider both the underlying trays *and* the arrangement of shrimp, because the drawings of patent '612 depict a tray with a particular, distinctive arrangement of shrimp on it. Jt. Ex. 1; *see* Keystone, 997 F.2d at 1450 ("A patented design is defined by the drawings in the patent, not just one feature of the claimed design."). While the tray's features are relevant to the infringement analysis-they are, after all, depicted in figure 5 of the '612 patent-they cannot, contrary to Defendants' contentions, form the entire basis for our substantial similarity analysis. *See* Keystone, 997 F.2d at 1451 (holding that court could not base substantial similarity solely on face of patented block, but had to consider all the features shown in the patent, as they would be seen by a purchaser of the block).

Indeed, we must bear in mind that the attention of the ordinary observer at the point of sale is far more likely to focus on the arrangement of shrimp than minor features of the structure of the underlying tray, for the simple reason that the shrimp cover and obscure most structural features of the tray-a fact reflected in the '612 drawings. Jt. Ex. 1, figs. 1-3, 5. This supports our conclusion that the structural differences between Defendants' and Plaintiff's trays are so minor that they cannot defeat a finding of substantial similarity, in light of the fact that the trays share key characteristics such as shape, a central cup, a shallow channel running inside the rim, and a folded outer lip, and given that there is no evidence of any dissimilarity in the respective arrangements of shrimp. Any finder of fact who did not find substantial similarity would be improperly insisting on complete identity of design. *See* OddzOn, 122 F.3d at 1405 ("The patented and accused designs do not have to be identical for design patent infringement to be found.").

This is true regardless of whether we adopt ZBI's contention that "the ordinary observer is a retail consumer shopping at a typical grocery store with a frozen food section interested in purchasing frozen shrimp products," Pl.'s Conclusions of Law para. 10, or Defendants' assertion that the "ordinary observer" should include "general purchasers of shrimp trays," caterers, and seafood distributors. Jt. Brief 56:22-25.

It may be true that professional buyers such as caterers and seafood distributors would notice differences in design that other observers might overlook. *See* Goodyear, 162 F.3d at 1117. Here, though, ConAgra's representative testified that Defendants sell their shrimp trays both to retail outlets and food service distributors. Jt. Ex. 3, Stone Depo. 24:2-9. This suggests that at least some of the observers of Defendants' trays at the point of final sale are retail consumers purchasing the trays for personal use.

Moreover, the evidence shows that United States consumers, no matter what their level of discernment, do not see the underlying features of Defendants' trays at the point of sale. ConAgra's representative testified that Defendants' trays are assembled, prepared, and frozen for shipping to the U.S. in Thailand, and that the product is not altered in any way after it reaches the U.S. Jt. Ex. 3, Stone Depo. 49:1-50:6. Although Defendants seemed to suggest in oral argument that their trays might be viewed at trade shows in the U.S. without shrimp on them, they acknowledged that they presented no evidence of this. Tr. 56:23-57:20.

In sum, our infringement inquiry must consider the combination of shrimp and tray, because patent '612 depicts both a tray and a specific arrangement of shrimp, and Defendants' products are marketed as trays containing shrimp. Applying the ordinary observer test to the overall appearance of the combination design,

we hold that any reasonable fact finder would conclude that the competing designs are substantially similar despite the minor differences in tray structure.

b. Point of Novelty Test

Beyond the ordinary observer test for measuring substantial similarity, "design patent infringement requires that the accused product 'appropriate the novelty in the patented device which distinguishes it from the prior art." ' Sun Hill, 48 F.3d at 1197, *quoting* Litton Sys., Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444, 221 USPQ 97, 109 (Fed.Cir.1984).

It is not proper to "evade the point of novelty test by relying on the claimed overall design as the point of novelty." Sun Hill, 48 F.3d at 1197. Nonetheless, the Federal Circuit has suggested that a point of novelty may "reside[ ] in the overall appearance of the combination" of features in the patented design. *See* L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1126 (Fed.Cir.1993).

Here, Defendants suggest that the arrangement of shrimp in patent '612 cannot constitute a point of novelty because the placement of food on a tray is not a patentable "article of manufacture" under 35 U.S.C. s. 171. *See* Tr. 47:18-48:19. This is a validity argument. As discussed in note 2, the peculiar posture in which the parties have brought their motions precludes us from addressing any issue other than infringement; we must assume for the moment that patent '612 is valid. *See* Defs.' Conclusions of Law para. 1 (stating that Defendants do not contest the validity of patent '612 for purposes of this motion).

ZBI contends that the point of novelty in patent '612 lies in the annularly arranged, overlapping shrimp, which form a mound that slopes downward from the central cup area toward the outer rim of the tray. *See* Pl.'s Statement of Facts para. 5. Our inquiry, then, focuses on whether the prior art as shown in the record contains this alleged point of novelty.

(1) Serving trays. The parties have produced copies of design and utility patents and other representations of trays that are cited as prior art in patent '612. Jt. Ex. 18. None of the drawings in the prior art patents appears to depict a serving tray with shrimp. Some of the prior art trays resemble '612 in that they are circular with a central receptacle. *See, e.g.,* Jt. Ex. 18 at 249, Des. 304,659 (combined chip and salsa server); id. at 308, Pat. 1,949,285 (service tray). Others are designed, like patent '612, to contain seafood. These trays are meant to hold oysters, though, not shrimp, and the particular arrangement of oysters either is not depicted or does not resemble the overlapping arrangement of shrimp shown in patent '612. Most of the oyster trays are divided into compartments, unlike the shrimp trays at issue here. *See, e.g.,* Jt. Ex. 18 at 301, Pat. 947,373.

The record also contains copies of photos of other circular trays with center receptacles labeled as "shrimp trays." Jt. Ex. 18 at 396-99. None of these trays is shown with shrimp on it, and it appears that the shrimp trays depicted could not hold an arrangement of shrimp similar to the one in patent '612. The central cup of each of these other shrimp trays is wide, so the outer ring area for holding shrimp appears to be too narrow to contain two overlapping circles of shrimp.

(2) ZBI's '120 utility patent. Defendants argue that '612's point of novelty is minimal or nonexistent because a prior ZBI invention, utility patent 5,869,120 ("patent '120"), captured the supposedly novel, ornamental elements of patent '612.

Patent '120 discloses a circular tray with a central cup. Jt. Ex. 19. The drawings of the embodiment of the patent show two concentric annular surfaces around the central cup. Each surface holds shrimp placed in a nesting fashion, with their tails facing out and their heads facing in. Id. at 400.

Defendants point out that the Patent and Trademark Office ("PTO") stated to ZBI during the '120 prosecution that it was obvious from the prior art to place shrimp "flat on their sides on trays with their tails exposed." Id. at 716. The PTO also stated that "[t]he particular positioning of the shrimp on the annular surface is seen to have been an obvious matter of choice and an obvious function of personal esthetics." Id. at 787.

Neither of these PTO statements, however, discusses a pattern of overlapping shrimp such as that shown in patent '612. There are clear differences in appearance between the '120 design and the '612 design. The two surfaces of the '120 tray are apparently designed to keep the two rows of shrimp from contacting each other, and essentially produce two separate terraces of shrimp. The '612 design, by contrast, shows the two rows of shrimp overlapping to form a mound. Jt. Ex. 1. Overlapping shrimp would appear to defeat one of the purposes of the '120 patent, which was to enable users of the tray to grasp each shrimp by the tail without touching the adjacent shrimp. Jt. Ex. 19 at 404.

(3) ZBI's '606 design patent. In 1995, ZBI began prosecuting a design patent that eventually matured into Des. 396,606 ("patent '606"). Unlike patent '612, the '606 design includes only one row of shrimp.

But when ZBI initially began prosecuting patent '606,-its drawings included a design with one row *as well as* a design with two rows. The PTO required ZBI to divide the application on the ground that the design with one row was "patentably distinct" from the design with two rows, Jt. Ex. 108 at 546, and ZBI subsequently reprosecuted the two-row design as patent '612.

Patent '606 therefore does narrow the scope of '612: It makes it clear that '612 would not protect a design with only one row of shrimp. But the PTO's statement also suggests that the inclusion of two rows of shrimp rather than one can constitute a point of novelty from the prior art.

(4) Paradise tray. This is a circular plastic tray with a center cup-like area and a broad annular surface. Jt. Ex. 111. The surface is cut with linear grooves that separate the surface into numerous wedge-shaped areas. There appears to be only one level; there is no ledge to speak of between the annular surface and the lip of the central cup.

The tray was created by Paradise, Inc. according to the declaration of Paradise's president. Gordon Decl. para.para. 6-7. Paradise designed the tray in 1985 for a company called Treasure Isle, id. para. 6, which, Gordon believes, is no longer in business, id. para. 9. Gordon believes that "Treasure Isle offered for sale and sold the shrimp trays with frozen shrimp placed on their sides around a cup of cocktail sauce." Id. para. 8.

Defendants offer no evidence that shrimp were placed on the Paradise tray in two overlapping rows to form a mound, with their tails pointed out and their heads pointed in. As a result, the Paradise tray does not provide evidence that such an arrangement of shrimp was not novel to patent '612.

(5) Other shrimp trays. The record contains representations of frozen products called "shrimp rings," Jt. Ex. 19 at 411-14, which appear to have been introduced as prior art in the prosecution of ZBI's patent '120.

The shrimp are arranged on their tips (rather than on their sides) in a ring arrangement around a central cup of cocktail sauce. None of the representations appears to depict two overlapping circles of shrimp.

(6) Defendants' prototypes. The record also contains copies of photographs of products created by Defendants other than the accused products. Jt. Ex. 14. Although the quality of the copies is poor, some of the products evidently do show overlapping circles of shrimp.

A representative of Defendant Ocean Duke acknowledged in his deposition, however, that these designs were prototypes that were marketed, if at all, only after ZBI began prosecuting patent '606 in 1996 (with the claims that eventually became patent '612). Jt. Ex. 12, Lin Depo. 94:3-98:17.

In fact, ZBI evidently was selling a '612-type product in 1995, Blazevich Decl. para.para. 4-5, and Lin admitted that Defendants probably had examined a ZBI tray during the design process, although he did not state that it was a tray with the features of the '612 design. Lin Depo. 59:19-24; 103:15-22.

(7) King Kullen tray. With their supplemental brief, Defendants introduced the declaration of Eric Sciulla, a seafood purchasing executive. Sciulla states that in the mid-1980s, he arranged a tray of shrimp that is pictured in a brochure for the grocery chain King Kullen. Jt. Exs. 122, 123.

The parties disagree on whether the evidence shows that Sciulla or King Kullen actually produced the depicted design in the 1980s, rather than within the last few years. We need not address these arguments because the designs in the brochure simply do not resemble the '612 design. The brochure shows multi-level trays of thawed shrimp, with lettuce between the levels. The shrimp do not overlap to form a mound. Patent '612 discloses shrimp overlapping to form a mound, without lettuce.

(8) Proctor Declaration. One of Defendants' expert declarants asserts that she has "seen the nesting of shrimps which forms a mound (overlapping layers of shrimps placed on their sides). It is a common arrangement of shrimps." Proctor Decl. para. 16. Proctor offers no evidentiary support for this statement, and fails to identify any specific designs that she may have seen. Her statement is inadequate to show that ZBI's claimed point of novelty was disclosed by the prior art.

In sum, none of the prior art in the record discloses patent '612's claimed point of novelty, which we described above on page 10. Defendants' accused products, on the other hand, track '612's claimed point of novelty very closely. As a result, we conclude that Defendants' accused products appropriate the point of novelty of patent '612.

III. Conclusion

ZBI has shown that there is no triable issue as to infringement because any reasonable trier of fact would find by a preponderance of the evidence that Defendants' accused products infringe patent '612 under both the substantial similarity and point of novelty tests. Accordingly, we GRANT ZBI's motion for partial summary judgment, and DENY Defendants' motion for partial summary judgment.

IT IS SO ORDERED.

C.D.Cal.,2000.
ZB Industries Inc. v. Conagra Inc.

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