Paper No. 36

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte ROBERT M. LIVINGSTON

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Appeal No. 1996-1224
Application 08/292,184

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ON BRIEF

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Before JOHN D. SMITH, WALTZ and SPIEGEL, ***Administrative Patent Judges***.

JOHN D. SMITH, ***Administrative Patent Judge***.

DECISION ON APPEAL

This is an appeal pursuant to 35 U.S.C. § 134 from the final rejection of claims 1 through 6, all the claims in the application.

Appealed claims 1 and 4 are representative and are reproduced below:

1. An edible spread comprising from 80-5wt% vegetable fat and 95-20wt% of an aqueous phase dispersed in the fat, CHARACTERIZED IN THAT;

a) the oleic acid content of the fat phase is 45-80wt% based on the weight of the fat phase,

b) the saturated fatty acid content of the fat phase is 5-20wt% based on the weight of the fat phase,

c) the trans fatty acid content of the fat phase is 0-10wt% based on the weight of the fat phase, and,

d) the 18-carbon fatty acid content of the fat phase is 70-100wt% based on the weight of the fat phase,

the fat phase having an N-line as measured by NMR in the area:

N_{10}=15-20% N_{20}=8-11% N_{30}=2-4% and N_{35}=0-2%,

said spread being further characterized by its freedom from animal fat and crystallization defects.

4. An edible spread according to claim 1 consisting essentially of from 55-65% by weight of a fat phase and 45-35% by weight of an aqueous phase, the fat phase consisting essentially of 40% olive oil, 20% rapeseed oil, 20% soybean oil and 20% hydrogenated soybean oil.

The references of record relied upon by the examiner are:

Poot et al. (Poot) 4,087,564 May 2, 1978

Gollan,[1] "Utilization of animal fats in margarine production," ***Boletin Tecnico Labal***, 2(4), 2-6 (1981)

Potter, ***Food Science***, 442, AVI Publishing Co., Inc., Westport, CT (2nd ed., 1973)

The appealed claims stand rejected under 35 U.S.C. § 103 as unpatentable over Poot in view of Gollan, admitted prior art, and Potter.

We cannot sustain the stated rejection.

The subject matter on appeal is directed to an edible spread, e.g., a margarine, comprising from 80-50wt.% vegetable fat and 95-20wt.% of an aqueous phase dispersed in the fat further characterized by a freedom from animal fat and

[1] A full copy of this Spanish publication is not of record. The examiner relied upon an English abstract of the publication throughout prosecution of the application.

crystallization defects. The fat phase of the claimed edible spread is further defined as having an oleic acid content of 45-80wt.%; a saturated fatty acid content of 5-20wt.%; a trans fatty acid content of 0-10wt.%; and the 18-carbon fatty acid content of 70-100wt.%. Further, the fat phase is defined as having "an N-line as measured by NMR in the area: N_{10} = 15-20%, N_{20} = 8-11%, N_{30} = 2-4% and N_{35} = 0-2%." Significantly, according

to appellant, the N-line values as recited in appealed claim 1 are not just characteristic of any type of margarine-type spreads, but rather of a very specific type of spread which is quite soft and easily spreadable at refrigerator temperature, yet firm enough at 20 and 30E C not to melt at ambient temperature. As further evident from appealed dependent claim 4, the fat phase of appellant's edible spread composition may consist essentially of 40% olive oil, 20% rapeseed oil; 20% soybean oil and 20% hydrogenated soybean oil.

By further way of background according to appellant, consumers have shown a preference for fats which are low in

saturates, low in trans fatty acids, low in 16-carbon fatty acids and which contain some polyunsaturated fats. See the specification at page 1, lines 22-26. A problem with providing such a spread is that it tends to be a liquid at room temperature. See the specification at page 1, lines 28 through 32. Another problem is that some combinations of fat used in the making of a spread may give rise to crystallization defects which result in detrimentally affecting the organoleptic properties of the spread. See the specification at page 3, lines 19-26. Appellant essentially addresses these prior art problems by providing a formulation utilizing olive oil as a major fat component.

As evidence of obviousness of the subject matter defined by appealed claims 1 through 6, the examiner relies on the combined teachings of Poot, Gollan, admitted prior art, and Potter. The crux of the examiner's obviousness rejection is based on the examiner's contention that one of ordinary skill in the art would "prepare the margarine of Poot utilizing the fat composition of Gollan since such a

recitation is seen to be a mere substitution of one known fat composition for another in the manufacture of an edible spread composition." See the Examiner's Answer at page 4. However, as emphasized by appellant (Reply Brief, page 3), such a substitution "would not give the applicant's spread." As appellant explains in the Reply Brief, Gollan mentions a variety of fat compositions which consist of animal fat such as lard, and suet (beef fat and mutton fat in 50/50 ratio), while the appealed claims define an edible spread characterized by its ***freedom from animal fat***.

The examiner also erred by dismissing the N-line values recited in the appealed claims as merely "characteristic to margarine type spreads." See the examiner's answer at pages 4 and 5. The examiner offers no evidentiary support for this conclusory statement. Indeed, appellant contends that margarines

and spreads on the market have N-line values significantly different from that of the claimed spread. See the reply brief at page 2.

Based on the above, we agree with appellant that the examiner has failed to establish a ***prima facie*** case of obviousness for the subject matter defined by the appealed claims. Accordingly, we cannot sustain the stated rejection of the appealed claims for obviousness.

The decision of the examiner is reversed.

REVERSED

JOHN D. SMITH Administrative Patent Judge	)	
THOMAS A. WALTZ Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
CAROL A. SPIEGEL Administrative Patent Judge	)	

JDS:psb

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Cushman Darby & Cushman
1100 New York Avenue, N.W.
Ninth Floor East Tower
Washington, D.C. 20005-3918