

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

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte CHRISTOPHER J. MILLEY

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Appeal No. 2002-1103  
Application No. 09/580,413

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ON BRIEF

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Before GARRIS, DELMENDO, and PAWLIKOWSKI, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the refusal of the Examiner to allow claims 1, 3, 5-11, 13-35, 67-71 and 73-94 which are all of the claims remaining in the application.

The subject matter on appeal relates to a peanut butter containing all natural ingredients comprising a substantially homogeneous mixture of peanut particles, peanut oil and a natural stabilizer to stabilize oils in the peanut butter. The natural stabilizer constitutes about 3-10 weight percent of the peanut butter and includes at least about 75 weight percent fatty acids.

Appeal No. 2002-1103  
Application No. 09/580,413

Alternatively, the natural stabilizer constitutes about 0.5-10 weight percent of the peanut butter and includes about 90-99.99 weight percent of non-modified fatty acids having a solid fat index at about 10°C of about 30-80 percent and a solid fat index at about 26.7°C of about 5-50. This appealed subject matter is adequately represented by independent claims 1 and 78 which read as follows:

1. A peanut butter containing all natural ingredients comprising a substantially homogeneous mixture of peanut particles, peanut oil and a natural stabilizer to stabilize oils in said peanut butter, said natural stabilizer including at least about 75 weight percent fatty acids and less than about 4 weight percent water, at least a majority of said fatty acids being non-modified fatty acids, said natural stabilizer constituting about 3-10 weight percent of said peanut butter.

78. A peanut butter containing all natural ingredients comprising a substantially homogeneous mixture of peanut particles, peanut oil and about 0.5-10 weight percent of a natural stabilizer to stabilize oils in said peanut butter, said natural stabilizer including about 90 - 99.99 weight percent non-modified fatty acids and less than about 5 weight percent water, said non-modified fatty acids having a solid fat index at about 10°C of about 30 - 80 percent and a solid fat index at about 26.7°C of about 5 - 50.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Stockton	1,395,934	Nov. 1, 1921
Fisher	2,496,461	Feb. 7, 1950
Schumacher	6,153,250	Nov. 28, 2000

Appeal No. 2002-1103  
Application No. 09/580,413

All of the claims on appeal are rejected under 35 U.S.C. § 103(a) as being unpatentable over Schumacher in view of Stockton and further in view of Fisher.

We refer to the brief and reply brief and to the answer and supplemental answer for a thorough discussion of the opposing viewpoints expressed by the Appellant and by the Examiner concerning the above noted rejection.

#### OPINION

For the reasons which follow, this rejection cannot be sustained.

On page 3 of the answer, the Examiner states that "[c]laims 1 and 3 differ from the [Schumacher] reference in [the] amount of fatty acids in the stabilizer, in the amount of water, and in the percentage of stabilizer in the peanut butter."<sup>1</sup> With regard to fatty acids specifically, independent claim 1 requires that the stabilizer includes at least about 75 weight percent fatty acids and independent claim 78 requires that the stabilizer includes about 90-99.99 weight percent non-modified fatty acids whereas

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<sup>1</sup> As a matter of clarification, we point out that the percentage range of stabilizer in the peanut butter of claim 1 overlaps the percentage range of stabilizer in the peanut butter of Schumacher.

Schumacher's stabilizer includes only about 1.96-46.15 percent fatty acids according to the Appellant's calculations on page 7 of the reply brief.<sup>2</sup> Concerning this claim distinction, the Examiner, after discussing the teachings of Stockton and Fisher, concludes that "it would have been obvious to use other amounts of natural fatty acids which are found in fats or isolated as fatty acids in the composition of Schumacher depending on the particular fat" (Answer, page 4).

We perceive no merit in this conclusion. As properly observed by the Appellant, neither Stockton nor Fisher contains disclosure of a stabilizer for peanut butter which includes the here claimed amount of fatty acids. Moreover, the Examiner has provided no exposition as to why an artisan with ordinary skill would have been motivated to provide Schumacher's stabilizer with other amounts of fatty acids that are within the ranges defined by the independent claims on appeal.

Additionally, the Examiner appears to believe that it would have been obvious to provide Schumacher's stabilizer with the here claimed amounts of fatty acids based upon the theory that "[t]he

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<sup>2</sup> Significantly, the Examiner has not questioned the accuracy of these calculations, nor do we.

Appeal No. 2002-1103  
Application No. 09/580,413

discovery of an optimum value of a result effective variable is ordinarily within the skill of the art" (Answer, page 7), citing In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). While this legal maxim is generally true for an optimum value within a prior art range, the Appellant's claimed percentages of fatty acids lie far outside the above noted range of Schumacher. For example, the lowest amount of fatty acids claimed by the Appellant is 75 weight percent whereas the highest amount of fatty acids in Schumacher's stabilizer is 46.15 weight percent. Under these circumstances, no support exists for the Examiner's apparent belief that an optimization of Schumacher's fatty acid amount would have yielded values within the Appellant's claimed ranges. See In re Sebek, 465 F.2d 904, 906, 175 USPQ 93, 95 (CCPA 1972).

Though less than a model of clarity, the remarks in the last full paragraph on page 4 of the supplemental answer reflect that the Examiner regards the stabilizer limitations of appealed claim 1 as satisfied by considering Schumacher's fatty acid to be the only stabilizer component of his composition. However, such a viewpoint is in direct conflict with the disclosure of the Schumacher patent. This is because patentee explicitly discloses that his stabilizer comprises three components, namely, chitosan, fatty acid and water (e.g., see the paragraph bridging columns 1 and 2 as well as the

Appeal No. 2002-1103  
Application No. 09/580,413

last paragraph in column 2). Thus, the Examiner's apparent view of Schumacher is not only arbitrary and capricious but incompatible with patentee's express teaching. Under these circumstances, the viewpoint under consideration must be regarded as without convincing merit.

Finally, the Examiner states that, "[a]s particularly, Fisher teaches the use of butter with the water removed, which is one of Appellant's stabilizing product, it is not seen how the butter of Fisher would not have the same amounts of fatty acids as claimed" (supplemental answer, page 11). It is unclear how the Examiner considers this statement to support her obviousness conclusion. Nevertheless, it is our perception that the statement is speculative on the Examiner's part. While both the Appellant and Fisher disclose peanut butter which contains processed butter, the respective methods by which the Appellant and Fisher process the butter are not identical (cf., the Appellant's method on lines 16-22 of specification page 13 and Fisher's method on lines 43-47 of column 1). For all we know, the temperatures of Fisher, which are far above the Appellant's butter-melting temperature, would render the fatty acid content of patentee's processed butter different from that of the Appellant's processed butter. Further, we observe

Appeal No. 2002-1103  
Application No. 09/580,413

that Fisher is silent as to the amount of this processed butter which is contained in his peanut butter.

The speculative nature of the Examiner's above noted statement renders it incapable of supporting an obviousness conclusion. We here remind the Examiner that a § 103 rejection must rest upon a factual basis rather than speculation. See In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967), cert. denied, 389 U.S. 1057 (1968).

In summary, we have carefully studied the Examiner's answer and supplemental answer. Notwithstanding this endeavor, we do not find any basis for reaching a determination that the Examiner has carried her initial burden of establishing a prima facie case of obviousness. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). It follows that we cannot sustain the Examiner's § 103 rejection of all appealed claims as being unpatentable over Schumacher in view of Stockton and further in view of Fisher.

Appeal No. 2002-1103  
Application No. 09/580,413

The decision of the Examiner is reversed.

REVERSED

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
ROMULO H. DELMENDO	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
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	)	
BEVERLY A. PAWLIKOWSKI	)	
Administrative Patent Judge	)	

BRG/jrg

Appeal No. 2002-1103  
Application No. 09/580,413

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