

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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CORINNE AGUILAR,
LAURENCE BECK NEE TRESCOL
and CHRISTIAN RIFFET

Appeal 2006-2315
Application 10/437,163
Technology Center 1700

Decided: February 26, 2007

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and LINDA M. GAUDETTE, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the Examiner's Final Rejection of claims 1-17, the only claims pending in this application.

Appellants' invention relates to an edible emulsion comprising live micro-organisms. The emulsion may be used in spreads, dressings, mayonnaises and the like. Claim 1, the sole independent claim, is illustrative of the invention:

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1. An edible oil-in-water emulsion comprising from 30 to 75% wt oil, water, live micro-organisms, and a preservation system, the emulsion having an edible acid content in the aqueous continuous phase in the range of from 0.1 to 3% by weight and a pH at 20°C of not less than 4.0.

The Examiner relies on the following prior art references to show unpatentability:

Gelfand US 1,697,312 Jan. 1, 1929

Lowe, "Experimental Cookery", 2nd Edition, John Wiley & Sons, Inc., 269-271 (1937).

Jay, "Modern Food Microbiology," 2nd Edition, D. Van Nostrand Co. 253-265 (1978).

McGee, "On Food and Cooking, Collier Books, MacMillain Publishing Co., 14 (1984).

The Examiner has rejected claims 1-17 under 35 U.S.C § 103(a) as unpatentable over Gelfand as further evidenced by McGee, Lowe and Jay.

ISSUES

The Examiner contends that one of ordinary skill in the art at the time of the invention would have understood Gelfand as disclosing the invention as claimed in light of the teachings of the secondary references. Appellants contend that Gelfand fails to disclose a product having live microorganisms. Appellants further contend that the Examiner has not clearly established that Gelfand uses an oil-in-water emulsion, the recited pH and edible acid content of claim 1. The issue before is whether the Examiner has shown, by

a preponderance of the evidence, that the claimed oil-in-water emulsion would have been obvious within the meaning of 35 U.S.C § 103(a).

FINDINGS OF FACT

- 1) Gelfand discloses a food product which is “an emulsion including vegetable oils, yolk material and the aromatic substances resulting from lactic acid fermentation of milk constituents.” (P. 1, ll. 3-7).
- 2) Gelfand teaches that the food product is made by pasteurizing a suitable milk material and inoculating it with a viable culture, then allowing the material to set at 70°F until “the proper amount of acid has been developed and the organisms have produced a sufficient quantity of flavoring constituents.” (P. 1, ll. 48-50).
- 3) Lactic acid bacteria, such as the bacteria used in yogurt and acidophilus milk, are known to produce up to 3% lactic acid. (Jay, p. 256).
- 4) Gelfand then incorporates, by emulsification, the cultured milk into an emulsion of oil and yolk material. (P. 1, ll. 94-99).
- 5) Milk is an oil-in-water emulsion. McGee, p. 14. Egg yolk and oil are known to form a stable oil-in-water emulsion. (Lowe, p. 271, 5th para.).
- 6) Gelfand teaches that a sufficient amount of edible organic acid in water solution is added to stabilize the product. (P. 2, ll. 88-94).
- 7) Gelfand states that a feature of the process involves “treating the emulsion in such a manner as to retain the aromatic substances produced by the bacteria of the milk product and at the same time, preventing the product from putrifying at ordinary room temperature, although including also yolk and vegetable oils.” (P. 1, ll. 24-29).

- 8) Gelfand notes that when organisms are allowed to propagate, they will die causing the milk product to become putrid “as a result of the multiplication of other putrifying organisms present.” (P. 1, ll. 21-22).
- 9) Gelfand teaches that the edible organic acid is, therefore, “of sufficient hydrogen ion concentration to suppress further growth of the organisms and their biological activities which have been introduced with the cultured milk material, so that no further undesirable bacteriological changes will take place in the product after it is placed on the market.” (P. 1, l. 108 - P. 2, l. 3). *See* P. 2, ll. 44-51 (“hydrogen ion concentration . . . is sufficient to substantially, if not entirely, arrest the further growth and biological activity”).

PRINCIPLES OF LAW

- 1) The Examiner bears the initial burden of establishing a *prima facie* case of obviousness. *See In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993).
- 2) The Examiner must initially produce evidence sufficient to support a ruling of obviousness; thereafter the burden shifts to the applicant to come forward with evidence or argument in rebuttal. *In re Piasecki*, 745 F.2d 1467, 1475, 223 USPQ 785, 788 (Fed. Cir. 1984)..
- 3) Attorney arguments are not evidence. *See C.R. Bard, Inc. v. Advanced Cardiovascular Systems*, 911 F.2d 670, 674 n.2, 15 USPQ2d 1540, 1544 n.2 (Fed. Cir. 1990).

ANALYSIS

Appellants argue that one of ordinary skill in the art would understand Gelfand's disclosure of suppressing further growth of the organisms and their biological activities as a teaching that *no* live micro-organisms are present in the finished product. Br. 9-10. The Examiner argues that one of ordinary skill in the art would understand this language as meaning that Gelfand retains the desirable microorganisms in a live state and controls only the undesirable, proteolytic microorganisms. Answer 6. We find the Examiner's reading of Gelfand more plausible. Gelfand uses the term "cultured." The Examiner points out, and Appellants do not refute, that the term "cultured" in connection with foods implies that the food contains live microorganisms. Answer 6. Moreover, the broad recitation of "live microorganisms" in the appealed claims does not distinguish over Gelfand's teaching that at least some live microorganisms will likely remain in the finished product. *See* Finding of Fact 9.

Appellants' remaining arguments are likewise unpersuasive in overcoming the Examiner's obviousness rejection. In our view, the Examiner has provided sufficient evidence to support a finding that one of ordinary skill in the art would understand that the emulsion is oil-in-water (i.e., McGee and Lowe) and that the amount of edible acid and pH of Gelfand's product would fall within the claimed ranges (i.e., Jay). *See* Answer 4-5. Appellants have not directed us to any evidence which establishes that the Examiner's findings are incorrect.

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CONCLUSION

We conclude that the facts and reasons set forth by the Examiner are sufficient to establish a prima facie showing of unpatentability of claims 1-17 under 35 U.S.C. § 103. Appellants have failed to overcome this showing.

ORDER

The final rejection of claims 1-17 under 35 U.S.C § 103(a) as unpatentable over Gelfand as further evidenced by McGee, Lowe and Jay is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(iv)(effective Sept. 13, 2004).

AFFIRMED

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