

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ZOHAR M. MERCHANT and
VIKKI J. NICHOLSON

Appeal No. 1996-3537
Application 08/302,596¹

ON BRIEF

Before PAK, WARREN, and LIEBERMAN, Administrative Patent
Judges.

PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final
rejection of claims 1 through 8 and 10 through 12 which are

¹ Application for patent filed September 8, 1994.

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all of the claims pending in the application.

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Claim 1 is representative of the subject matter on appeal and reads as follows:

Claim 1. A method for producing a microcapsule flavor delivery system comprising:

(a) providing a mixture of a flavoring material selected from the group consisting of an oil soluble flavor dissolved in an oil and an o/w emulsion flavor and a protein solution;

(b) subjecting said mixture to low shear mixing to provide an o/w pre-emulsion;

(c) subjecting said pre-emulsion to high shear mixing or sonication to provide an o/w emulsion having a coating of protein around the internal oil droplets;

(d) mixing the o/w emulsion with a liquified hard fat which is solid at room temperature to provide an o/w/o emulsion; and

(e) atomizing the o/w/o emulsion onto a planar surface or into a fluid to provide microcapsules having a flavoring material in the internal oil phase, said microcapsules having a particle size of from about 20 microns to about 200 microns.

As evidence of obviousness, the examiner relies on the following prior art:

Moran et al. (Moran) 0 076 549 Apr. 13,
1983
(Published European Patent Application)

Claims 1 through 8 and 10 through 12 stand rejected under 35 U.S.C. § 103 as unpatentable over the disclosure of Moran.

We reverse.

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The claimed subject matter is directed to a method for producing a microcapsule flavor delivery system which is in an oil-in-water-in-oil emulsion. The method involves subjecting a specific mixture to low shear mixing to provide an oil-in-water pre-emulsion; subjecting the pre-emulsion to high shear mixing or sonification to provide an oil-in-water emulsion having a coating of protein around the internal oil droplets; mixing the emulsion with a liquefied hard fat; and atomizing the resulting mixture to form microcapsules having a particle size of from about 20 microns to about 200 microns. According to page 4 of the specification, the oil-in-water-in-oil microcapsules are formed to provide flavor stability in aqueous products.

The examiner recognizes that "[t]he claims . . . differ from Moran in the recitation of atomizing the o/w/o emulsion to form microcapsules [of the claimed sizes]." See Answer, page 4. The examiner, however, concludes that "[i]t would be obvious to one of ordinary skill in the art to spray the liquid product of Moran onto or into a food product in order to flavor it with the cream flavor of example 1." Id.

On this record, we determine that the examiner's

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conclusion of obviousness is unsupported by any factual evidence. The examiner simply has not supplied any evidence that the spread of the type described in Moran was known to be used in the form of microcapsules having the claimed particle sizes. Nor has the examiner supplied any evidence regarding the desirability of employing the claimed spraying technique to form the spread of the type described in Moran or of using the spread of the type described in Moran in the form of microcapsules having the claimed particle sizes. Indeed, the examiner does not refer to any evidence to demonstrate that the application of a spraying technique to form microcapsules is known to one of ordinary skill in the food art. Accordingly, we reverse the examiner's Section 103 rejection of all of the appealed claims.

The decision of the examiner is reversed.

REVERSED

CHUNG K. PAK)
Administrative Patent Judge)
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CKP:svt

FITCH EVEN TABIN & FLANNERY
135 South LaSalle Street
Suite 900
Chicago, IL 60603