

**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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte AMARJIT S. BAKSHI and LAKHO L. KHATRI

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Appeal No. 1997-0527  
Application No. 08/380,255<sup>1</sup>

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ON BRIEF

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Before GARRIS, PAK and SPIEGEL, Administrative Patent Judges.  
GARRIS, Administrative Patent Judge.

**DECISION ON APPEAL**

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<sup>1</sup> Application for patent filed January 30, 1995. According to appellants, this application is a continuation of Application No. 08/105,005 filed August 11, 1993, now abandoned.

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This is a decision on an appeal from the final rejection of claims 1 through 17 and 32 through 42 which are all of the claims remaining in the application.<sup>2</sup>

The subject matter on appeal relates to a method for making a reduced fat nut butter product comprising the steps of combining from about 30% to about 75% of a nut paste with from about 15% to about 45% of one or more water-soluble, non-fat dry solid, intimately mixing the combination by passing it through an extruder mixer and then homogenizing the mixture. This appealed subject matter is adequately represented by independent claim 1 which reads as follows:

1. A method for making a reduced fat nut butter product comprising the steps of:

(a) combining  
from about 30% to about 75% of a nut paste,  
from about 15% to about 45% of one or more water-soluble, non-fat dry solid,  
from about 0% to about 10% of an added edible oil,  
from about 0% to about 30% of at least one water-insoluble non-fat dry solid, and

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<sup>2</sup> In claim 11, "the stabilizer" lacks antecedent basis. This informality should be corrected in any further prosecution that may occur.

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from about 0% to about 3% emulsifier, where the percentages are weight percentages based on the total weight of the nut butter product;

(b) intimately mixing the combination by passing it through an extruder mixer simultaneously with the generation of free nut oil; and then

(c) homogenizing the mixture under a pressure of at least about 4,000 psig.

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The references relied upon by the examiner as evidence of obviousness are:

Richardson et al. (Richardson) 1942	2,302,574	Nov. 17,
Dzurik et al. (Dzurik) 1971	3,619,207	Nov. 9,
Avera 1988	4,728,526	Mar. 1,
Yokoyama et al. (Yokoyama) 1989	4,814,195	Mar. 21,
Mange et al. (Mange) 1989	4,839,193	Jun. 13,
Wong et al. (Wong) 1992	5,079,027	Jan. 7,

According to the Examiner's Answer, claims 1 through 11, 13 through 17, and 32 through 42 are rejected under 35 U.S.C. § 103 as being unpatentable over Mange in view of Dzurik, Avera and Richardson and further in view of Wong, and claim 12 is correspondingly rejected over these references and further in view of Yokoyama.

We will not sustain either of the above noted rejections.

All of the claims on appeal require mixing the combination of from about 30% to about 75% of a nut paste and from about 15% to about 45% of one or more water-soluble, non-fat dry solid, by passing it through an extruder mixer and then homogenizing the mixture under a pressure of at least

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about 4,000 psig. From our perspective, the examiner has failed to establish a prima facie case of obviousness with respect to this claimed feature. More specifically, the examiner has advanced on this appeal no convincing explanation as to why the applied references would have suggested mixing nut paste and dry solid in the aforementioned concentrations by way of an extruder mixer.

We recognize that certain references, such as Mange and Wong, disclose mixing various ingredients in an extruder. Similarly, certain references, such as Dzurik and Wong, disclose adding a water-soluble, non-fat dry solid to a nut material. However, the examiner has not pointed out any disclosures in the applied references which, in our view, would have suggested mixing in an extruder the combination of a nut paste and from about 15% to about 45% of one or more water-soluble, non-fat dry solid as required by the appealed claims.

Instead, with regard to the above noted dry solid concentration feature, the examiner simply alleges that "[i]t would have been obvious . . . to add particular ingredients in the required amounts" (Answer, page 4) and that "[t]he

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particular amounts of ingredients are seen as being adjustable by one of ordinary skill in the art" (Answer, page 5). Such assertions, in the absence of evidentiary support by the applied prior art, are simply inadequate to establish a prima facie case of obviousness. We appreciate that the examiner, in her response to the argument section of the Answer refers to Mange's disclosure regarding the maximum sugar content of almond paste confectionary in general. However, this specific disclosure and indeed the Mange patent generally lack a teaching or suggestion of mixing a paste with sugar or other such material in dry solid form and in the concentration required by the appellants' claims. Indeed, as correctly pointed out in the Brief, it is at best speculative as to whether the saccharose added at the beginning of Mange's process would be in the here claimed form of a dry solid much less in the here claimed concentration.

In light of the foregoing, it is our determination that we cannot sustain the examiner's § 103 rejection of claims 1 through 11, 13 through 17, and 32 through 42 as being unpatentable over Mange in view of Dzurik, Avera and Richardson and further in view of Wong or her § 103 rejection

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of claim 12 as being unpatentable over these references and  
further in view of Yokoyama.

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The decision of the examiner is reversed.

**REVERSED**

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
CHUNG K. PAK	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
CAROL A. SPIEGEL	)	
Administrative Patent Judge	)	

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Pretty, Schroeder, Brueggemann & Clark  
Suite 2000  
444 South Flower  
Los Angeles, CA 90071