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Arent Fox LLP - Los Angeles			MCCLAIN-COLEMAN, TYNESHA L.	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RUDI DEN ADEL, GEORG CHRISTIAN DOL,
RONALD PETER POTMAN, and IRENE ERICA SMIT-KINGMA¹

Appeal 2020-006165
Application 14/400,173
Technology Center 1700

Before N. WHITNEY WILSON, CHRISTOPHER C. KENNEDY, and
JENNIFER R. GUPTA, *Administrative Patent Judges*.

KENNEDY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1–8, 10–17, 20, and 21. We have jurisdiction under 35 U.S.C. § 6(b). We REVERSE.

BACKGROUND

The subject matter on appeal relates to processes for manufacturing edible water-in-oil emulsions, and to emulsions produced by those

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. The Appellant identifies the real party in interest as Upfield U.S. Inc. Appeal Br. 3.

processes. *E.g.*, Spec. 1:5–8; Claims 1, 8. Claim 1 is reproduced below from page 12 (Appendix A) of the Appeal Brief:

1. A process for manufacturing an edible water-in-oil emulsion, comprising the steps of:
 - a) providing a water-phase;
 - b) providing a liquid oil;
 - c) providing a fat powder comprising hardstock fat;
 - d) providing a hardstock fat in liquid form;
 - e) mixing the fat powder comprising hardstock fat, the hardstock fat in liquid form, and the liquid oil to form an oil-slurry, wherein the hardstock fat in liquid form is completely liquid before contact with the fat powder; and
 - f) mixing the oil-slurry formed at step e) with the water-phase to form the water-in-oil emulsion;wherein the provided fat powder is not subjected after production to a temperature at which a substantial part of the fat powder melts, and the water-in-oil emulsion is fat-continuous and comprises 10 to 85 wt. % of a dispersed water-phase and 15 to 90 wt. % of total fat.

REJECTIONS ON APPEAL

The claims stand rejected under 35 U.S.C. § 103 as follows:

1. Claims 1–4, 6, 7, 16, 17, 20, and 21 over Wieske (US 4,888,197, issued Dec. 19, 1989) and Wubbolts (WO 2005/014158 A1, published Feb. 17, 2005).
2. Claims 5, 8, and 10–15 over Wieske, Wubbolts, and Tio (WO 2010/069753 A1, published June 24, 2010).

ANALYSIS

Claim 1 requires, *inter alia*, that “the hardstock fat in liquid form is *completely liquid* before contact with the fat powder” (emphasis added).

There does not appear to be any dispute that at least some of Wieske’s hardstock fat in liquid form (Wieske’s fraction 2) has crystallized before contacting fat powder in the Examiner’s proposed combination. The Examiner nevertheless determines that such falls within the scope of claim 1 because Wieske’s fraction 2 is described as “pumpable,” and, according to the Examiner, “[i]t is well understood that pumpable refers to the ability to move or transfer fluids or liquids.” Ans. 13. The Examiner therefore interprets the term “completely liquid” as simply “a fluid,” and the Examiner determines that “it is clear that the pumpable fraction 2 of Wieske successfully meets the claimed limitation of the hardstock fat in liquid form is completely liquid.” *Id.*

It is unreasonable to interpret the term “completely liquid” as encompassing hardstock fats that have already undergone some amount of crystallization. A liquid that has already undergone some amount of crystallization is not “completely” liquid. In effect, the Examiner’s interpretation renders the word “completely” a nullity, and such interpretations are disfavored. *See Power Mosfet Techs., LLC v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004) (“[I]nterpretations that render some portion of the claim language superfluous are disfavored.”).

To the extent the Examiner interprets the word “before” as encompassing a hardstock fat that is completely liquid *at any time* prior to contact with the fat powder, we also find that interpretation to be unreasonably broad. As noted above, there does not appear to be any

dispute that Wieske purposefully initiates crystallization of its fraction 2 prior to mixing with fraction 3. *See* Wieske at 5:60–6:34. Wieske’s fraction 2 cannot reasonably be said to be in “completely liquid” form “before contact[ing] . . . the fat powder,” as required by claim 1, given that the Examiner and Appellant appear to agree that Wieske’s fraction 2 is partially crystallized before contacting the fat powder.

On this record, the Examiner has not established that the subject matter of claim 1 would have been obvious in view of Wieske and Wubbolts. Because the remaining claims on appeal depend from claim 1, directly or indirectly, and the Examiner’s analysis of those claims does not remedy the error identified above, the Examiner likewise has not established that the subject matter of those claims would have been obvious.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	References	Affirmed	Reversed
1–4, 6, 7, 16, 17, 20, 21	103	Wieske, Wubbolts		1–4, 6, 7, 16, 17, 20, 21
5, 8, 10–15	103	Wieske, Wubbolts, Tio		5, 8, 10–15
Overall Outcome				1–8, 10–17, 20, 21

REVERSED