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Act. 412 REPOSPRESRECU Folios: 22

TOBOS

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Referencia: Expediente No. 08-19258

Solicitante: Unilever N.V.

Titulo de la Invención: "Concentrado empacado para preparar un

caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado
comprende Glucomanano"

Opositor: Quala S.A.

RECURSO DE REPOSICIÓN

ANDREA TOBOS MATEUS, mayor de edad y vecina de Bogotá D.C., identificada como aparece al pie de mi firma, en mi condición de apoderada de la sociedad Quala S.A., domiciliada en Bogotá, D.C., Colombia, respetuosamente me dirijo a usted con el fin de interponer RECURSO DE REPOSICIÓN contra la Resolución No. 56223 de fecha 26 de septiembre de 2012, notificada por Listado Único de Notificaciones de Propiedad Industrial No 439 del 02 de octubre de 2012 desfijado el 02 de noviembre de 2012, con el propósito de que se revoque la mencionada resolución.

1. PETICION

1.1. Que se declare fundada la oposición presentada el día 26 de noviembre de 2009 por la sociedad Quala S.A.

1.2. Que se revoque la Resolución No. 56223 de fecha 26 de septiembre de 2012, y en su lugar, se deniegue la patente para el invento titulado "Concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado comprende Glucomanano" según se solicitó en el expediente administrativo No. 08-19258.

2. HECHOS

2.1. El día 25 de febrero de 2008, la empresa Unilever N.V. presentó solicitud de patente ante la Superintendencia de Industria y Comercio -SIC- para la invención: "Concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado comprende Glucomanano", se le asignó el número de radicación 08-19258. Al momento de la presentación, la solicitud contenía 14 reivindicaciones.

2.2. La solicitud fue publicada en la Gaceta de la Propiedad Industrial No. 607 del 31 de agosto de 2009.

2.3. El 5 de octubre de 2009, la Dra. Alicia Lloreda Ricaurte, apoderada de Unilever N.V., radicó solicitud de elaboración del examen de patentabilidad para la invención.

2.4. La sociedad Quala S.A. radicó oposición a la solicitud de patente de Unilever el día 26 de noviembre de 2009 con fundamento en la falta de nivel inventivo de acuerdo con el artículo 18 de la Decisión 486.

2.5. El examen de fondo para la invención se emitió mediante oficio No. 8147 y fue notificado por fijación en lista del 23 de mayo de 2012. Este examen contenía observaciones de falta de claridad de las reivindicaciones, de falta de novedad de las reivindicaciones 1, 2, 5, 7, 9, 10 y 12 debida al documento WO 0070970 y falta de nivel inventivo de la reivindicación 6 con fundamento en lo divulgado en US 4,894,250, esta última también citada por el opositor como fundamento de falta de nivel inventivo de la invención.

2.6. El 22 de agosto de 2012, la sociedad solicitante presenta respuesta al examen de patentabilidad adjuntando un nuevo juego de reivindicaciones 1 a 18 que reemplazan a las originalmente presentadas.

2.7. Ese Despacho emite la Resolución No. 56223 de fecha 26 de septiembre de 2012, por medio de la cual otorga la patente para la invención "Concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado comprende Glucomanano" por considerarla que cumple con los requisitos de patentabilidad de acuerdo con la Decisión 486 y declara infundada la oposición argumentando que el opositor falló en demostrar porque el objeto de la solicitud carece de nivel inventivo y porque no se suministraron efectos técnicos que permitieran realizar un juicio respecto a la falta de nivel inventivo.

3. FUNDAMENTO DEL RECURSO

3.1. Los documentos mencionados en la a oposición presentada por la sociedad Quala S.A. si afectan el nivel inventivo de la solicitud titulada "Concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado comprende Glucomanano".

Después de analizar la oposición y la respuesta ofrecida por el solicitante, el Examinador considera lo siguiente:

"Por su parte, el solicitante responde sobre los argumentos y documentos citados por la opositora; mencionando que estos no pueden ser considerados porque hacen referencia a propósitos, aplicaciones y problemas diferentes a los señalados por el solicitante puesto que estos documentos no enseñan que la forma de gel corresponda al formato adecuado para preparar un concentrado saborizante que pueda incluir ingredientes húmedos o líquidos y por lo tanto, no se entiende cómo podría obtenerse un concentrado saborizante en forma de gel que permita el uso de ingredientes húmedos y que siga teniendo un alto porcentaje de sal.

Analizadas las razones anteriormente expuestas, se concluye que la sociedad opositora falló en demostrar la carencia de nivel inventivo de la presente solicitud. Además, la opositora no suministra algún efecto técnico que permita realizar un juicio respecto a la falta de nivel inventivo".

3.1.1. El documento US 4,894,250 (D1 en la oposición y D2 en el examen de patentabilidad elaborado por la SIC) sí afecta el nivel inventivo de el concentrado empacado de Unilever.

Los datos de esta publicación de patente son:

Publicación No. US 4,894,250

Fecha de publicación: 16 de enero de 1990

Título de la Invención: "Thermo-irreversible edible gels of glucomannan and xantan gums"

Solicitante: MARS G B LTD

Inventores: MUSSON, Gary D y PREST, Colin T.

La invención publicada en US 4,894,250 fue considerada relevante en el análisis de patentabilidad que hizo ese Despacho para la presente solicitud, y precisamente el Examinador de la SIC en el resultado de examen de patentabilidad concluyó que la solicitud de Unilever, y particularmente la reivindicación 6, carecía de nivel inventivo debido a las enseñanzas contenidas en US 4,894,250 (D1 en la oposición y D2 en el examen de patentabilidad elaborado por la SIC)¹.

La invención presentada en la publicación US 4,894,250 está basada en el hecho de que un gel termoirreversible puede ser producido por la interacción de una solución acuosa de goma de xantan y goma de glucomanano, con la aplicación de un tratamiento de térmico (Columna 1, líneas 20 a 25 de la publicación). Otras gomas o agentes gelificantes tales como: agar, carraginata, pectina, alginato, gellan, goma guar, etc., pueden ser incorporadas en el sistema básico gelificante para modificar la textura del gel obtenido (Columna 1, líneas 40 a 43 de la publicación).

Específicamente, la publicación US 4.894.250, en sus reivindicaciones reclama:

¹ Oficio No. 8147 del 23 de mayo de 2012, expediente No. 08-19258, página 154.

- Un método para producir un gel acuoso termoirreversible, el cual comprende principalmente una combinación gelificable de goma de xantan y goma de glucomanano (reivindicación 1).
- Un gel que también incluye materiales comestibles como carne, fruta o material vegetal (reivindicaciones 4 y 5).
- En donde el gel también incluye otras gomas y/o otros agentes gelificantes, como por ejemplo: agar, carraginata, pectina, alginato, gellan o goma guar (reivindicaciones 6 y 7).
- En donde la concentración de goma de xantan y glucomanano en la fase acuosa es de 0.02 % a 6%, en peso del gel y mas preferiblemente de 0.5 % a 4%, en peso del gel (reivindicaciones 10 y 11).

El objeto de la invención de Unilever es un concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, en donde uno de sus componentes es un agente gelificante que precisamente comprende glucomanano y, opcionalmente uno o más agentes gelificantes.

Se puede observar que en el documento US 4,894,250 se reporta la inclusión de glucomanano y uno o más agentes gelificantes en un porcentaje de va de 0.02% hasta el 6% del peso del gel, con lo cual el rango que pretende proteger Unilever de 0.8% a 4% cae dentro del rango presentado en la publicación estadounidense, así la base para calcular la base sea diferente (en uno se calcula sobre el porcentaje en agua y en el otro sobre el producto total).

El producto presentado en la publicación US 4,894,250, coincide al igual que en la solicitud presentada por Unilever en la utilización de otros agentes gelificantes más específicamente: carraginata, gelano y xantan, este último con gran relevancia dentro de la anterioridad expuesta. Esto muestra claramente que la combinación de estos agentes gelificantes ya ha sido usada en la industria alimenticia años atrás.

De igual manera, este documento US 4,894,250 (D1 en la oposición y D2 en el examen de patentabilidad elaborado por la SIC) también permite la inclusión de materiales comestibles en el gel para la elaboración de un sinnúmero de productos alimenticios que sirve para llegar indefectiblemente a la característica del concentrado de Unilever que consiste en adicionar carne, pescado, hierbas, frutas o vegetales y/o sabores, y/o extracto de levadura, y/o proteína hidrolizada de origen vegetal, de soja de pescado o de carne, y/o hierbas, vegetales, frutas, pescado, crustáceos o particulados de los mismos al concentrado empacado porque precisamente una de sus funciones es servir de condimento.

En consecuencia, para la época de desarrollo del concentrado de Unilever existían divulgaciones como el documento US 4,894,250 que permitían a un experto en la materia técnica correspondiente, llegar de manera obvia a la solicitud reclamada por Unilever.

3.1.2. El documento US 4,427,704 (D2 en la oposición) sí afecta el nivel inventivo de el concentrado empacado de Unilever.

Los datos de esta publicación de patente son:

Publicación No. US 4,427,704

Fecha de publicación: 24 de enero de 1984

Título de la Invención: "Food product thickened or gelled with carrageenan and glucomannan"

Solicitante: MARS LTD

Inventores: CHENEY, Peter; STARES, John; VERNON, Alan

Esta publicación se relaciona con un material comestible que posee una fase gelificante o espesante que comprende una mezcla o reacción de al menos una carraginata y al menos un glucomanano, donde la fase gelificada puede ser un gel termorreversible o termoirreversible.

La invención descrita en US 4,427,704 revela muchas de las características del concentrado de Unilever por cuanto muestra que los agentes gelificantes como glucomanano y carraginata en la fase acuosa están presentes en un porcentaje de 0.01% a 5% en peso de la fase acuosa, lo cual se muestra en las reivindicaciones del concentrado de Unilever cuando señala que el concentrado comprende la mezcla o combinación de glucomanano y carraginata en un porcentaje de 0.8% a 4%, que está comprendido dentro del porcentaje de la patente estadounidense.

Así mismo, el documento US 4,427,704 enseña que el producto puede contener otros materiales que le aportan sabor, tal y como se muestra en su reivindicación 15, los cuales son seleccionados del grupo que consiste carnes y otros materiales proteínicos de origen vegetal o animal; lo que afecta directamente el concentrado de Unilever que también comprende sólidos del tipo antes divulgado por US 4,427,704.

De otra parte, el método que divulga la solicitud estadounidense US 4,427,704 en las reivindicaciones 15 a 26, afecta el método que busca reclamar Unilever en esta solicitud de patente por cuanto comprende los mismos pasos de mezclar los ingredientes y someterlos a calentamiento al menos 50°C (ver reivindicación 18 del arte previo US 4,427,704).

Lo descrito en el documento US 4,427,704 le resta nivel inventivo a la invención de Unilever en los aspectos de incluir la mezcla de materiales gelificantes, específicamente glucomanano y carraginata e incluir elementos proteínicos procedentes de la carne y vegetales, para dar sabor al producto.

3.2. El documento WO 0070970 citado por el Examinador en su examen de patentabilidad como documento D1 continúa afectando la novedad del concentrado de Unilever a pesar de las modificaciones que se hayan hecho a la solicitud.

Los datos de esta publicación de patente son:

Publicación No. WO 0070970

Fecha de publicación: 30 de noviembre de 2000

Título de la Invención: "Ionic Stable Emulsion Sauce"

Solicitantes: UNILEVER NV; UNILEVER PLC; LEVER HINDUSTAN LTD

Inventores: BAUER, Roland; GIMELLI, Kenneth.

Este documento de patente fue mencionado por el Examinador colombiano en su análisis de patentabilidad en donde encontró que las enseñanzas contenidas en esta publicación afectaban la novedad de las reivindicaciones 1, 2, 5, 7, 9, 10 y 12 de la solicitud de Unilever².

Este documento WO 0070970 (D1 en el examen de patentabilidad colombiano), enseña *"un líquido o salsa en pasta estable en almacenamiento"* (ver página 1, líneas 4 a 5) y más adelante muestra que el la salsa concentrada que se reclama en dicho documento puede ser fluida o en pasta (ver página 7, línea 17) por lo que este documento ya anticipaba un concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento.

De igual manera, en la página 7, líneas 18 a 19 se revela que el concentrado comprende *"aproximadamente 20 – 40% de agua"* tal y como se pretenden proteger en la presente solicitud que señala un contenido de agua en el concentrado muy cercano a aquel divulgado en WO 0070970.

En cuanto a la inclusión de agentes gelificantes dentro del concentrado, este documento del arte previo también informa que es posible la adición de goma xantan en una cantidad de 0.1 a 0.25% (ver página 8, líneas 4 a 9), y que es posible la adición de almidón en cantidades que van desde 1 a 5% y preferiblemente de 1.5 a 2.5 % (página 8, líneas 11 a 3) o cualquier otra goma convencional (Ver página 8, líneas 20 a 24).

Ahora en cuanto al contenido de sal, este documento WO 0070970 muestra que se puede adicionar al concentrado de 2 a 18% de cloruro de sodio (ver página 7, línea 22) y preferiblemente de 8 a 12 % de cloruro de sodio, con lo cual si se tiene en cuenta que el contenido de agua en dicho concentrado es de 20 a 40%, el contenido de sal resultante será desde 5 a 90%, concluyendo de esta manera que el uso de

² *Ibidem*

porcentajes altos de sal en preparaciones para condimentar, que tienen la reología de gel, ya eran posibles.

Adicionalmente, en el documento WO 0070970 se señala que el concentrado puede tener sólidos de diversa índole como especias, sabores a queso, cebolla, preservativos, etc. (ver página 11, líneas 20 a 22); estos sólidos se presentan en el producto de WO 0070970 en un porcentaje de 25 a 65% y preferiblemente de 50% a 65% (ver página 7, líneas 19 a 21).

El solicitante explica que este documento no menciona el glucomanano, pero es que este compuesto esta mencionado en los otros documentos que afectan la patentabilidad de la solicitud de Unilever, y además, este documento WO 0070970 revela que se puede incluir cualquier otra goma convencional (Ver página 8, líneas 20 a 24 del documento WO 0070970).

De esta manera, considero de manera respetuosa que la respuesta del solicitante del día 22 de agosto de 2012 no es suficiente para superar los problemas de novedad y nivel inventivo que presentan sus reivindicaciones dado que todas las características técnicas del concentrado ya habían sido divulgadas o eran fácilmente derivables de las mezclas en gel comestibles del estado de la técnica.

3.3. Indicios de falta de nivel inventivo según la Guía para Examen de solicitudes de patente de invención y modelo de utilidad elaborada por la SIC.

La solicitante falla al declarar que:

"(...)estos documentos no enseñan que la forma de gel corresponda al formato adecuado para preparar un concentrado saborizante que pueda incluir ingredientes húmedos o líquidos y por lo tanto, no se entiende cómo podría obtenerse un concentrado saborizante en forma de gel que permita el uso de ingredientes húmedos y que siga teniendo un alto porcentaje de sal.."³

A partir de los documentos WO 0070970, US 4,894,250 y US 4,427,704 era posible obtener el concentrado de Unilever por cuanto en dichos documentos se anticipan y señalan enseñanzas para poder llegar de manera evidente a "un concentrado saborizante que pueda incluir ingredientes húmedos o líquidos y que siga teniendo un alto porcentaje de sal".

Tal y como lo señalo el Examinador, el concentrado de Unilever esta anticipado en todas sus características por el documento del arte previo WO 0070970 con lo cual no cuenta con novedad a pesar de los cambios que se hicieron en las reivindicaciones presentadas junto con la respuesta del examen.

³ Resolución 56223 del 26 de septiembre de 2012, página 2.

Adicionalmente, no cuenta con nivel inventivo, en la medida que a partir de las divulgaciones hechas en US 4,894,250 y US 4,427,704 era posible llegar de manera evidente al concentrado como se reclama actualmente en las reivindicaciones analizadas.

Según lo anterior, el concentrado empacado de la sociedad Unilever no es novedoso de acuerdo con el documento señalado por el Examinador como D1 (WO 0070970), y tampoco representa ningún avance en el estado de la técnica que no se hubiera podido derivar de manera evidente a partir de los documentos citados por el opositor.

En conclusión, los documentos presentados por la sociedad Quala S.A. en su oposición, si son relevantes para determinar la patentabilidad de la invención de Unilever que se estudia bajo el expediente No. 08-19258 y por lo tanto, solicito muy respetuosamente que se declare fundada la oposición radicada por mi poderdante Quala S.A., se tenga en cuenta la observación de falta de novedad elaborada por su Despacho en la etapa de examen y en consecuencia, se niegue el derecho de patente para el invento "Concentrado empacado para preparar un caldo, sopa, salsa, jugo de carne o para uso como un condimento, el concentrado comprende Glucomanano".

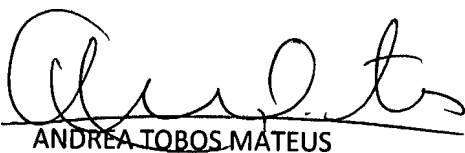
3.4. Estado actual de las solicitudes paralelas a esta invención en otros países.

En la respuesta del examen de patentabilidad, el solicitante declaró que esta solicitud de patente había sido otorgada en Europa; sin embargo, aprovecho la oportunidad para informarle a ese Despacho que la solicitud para este mismo caso en Estados Unidos No. 12/072,200, está abandonada por cuanto el solicitante no presentó respuesta al examen de patentabilidad, en el cual se hicieron observaciones muy similares a las presentadas en la oposición y examen de patentabilidad emitido por ese Despacho para este asunto.

4. NOTIFICACIONES

Recibiré notificaciones en mi oficina ubicada en la Carrera 7C No. 138-19 oficina 901 de la ciudad de Bogotá, D.C. Colombia.

Atentamente,



ANDREA TOBOS MÁTEUS

C.C. 52.223.325 de Bogotá

T.P. 148648

Anexos: Examen de patentabilidad efectuado en la solicitud de patente US 12/072,200



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/072,200	02/25/2008	Chiharu Inoue	F7979(V)-X	4117

201	7590	06/24/2010
UNILEVER PATENT GROUP		
800 SYLVAN AVENUE		
AG West S. Wing		
ENGLEWOOD CLIFFS, NJ 07632-3100		

EXAMINER
CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
1781	

NOTIFICATION DATE	DELIVERY MODE
06/24/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No.	Applicant(s)	
	12/072,200	INOUE ET AL.	
	Examiner	Art Unit	
	JYOTI CHAWLA	1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on 2/25/2008.

2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) 1-22 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) 1-22 is/are rejected.

7) ☐ Claim(s) _____ is/are objected to.

8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☒ All b) ☐ Some * c) ☐ None of:

1. ☒ Certified copies of the priority documents have been received.

2. ☐ Certified copies of the priority documents have been received in Application No. _____.

3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)	4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)	5) ☐ Notice of Informal Patent Application
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>6/2/08, 7/10/08</u> .	6) ☐ Other: _____

DETAILED ACTION

Claims 1-22 are pending and examined in the current application.

Double Patenting

The **nonstatutory double patenting** rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-22 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-3, 8-20

Application/Control Number: 12/072,200

Page 3

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of copending Application No. 12/072260 in view of Finnie et al. (US 6391358).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the subject matter of Claims 1-20 of the conflicting copending Application differs from the current application in the type of gelling agent in the concentrate for preparing a billion, broth, soup etc. The gelling agent in the conflicting copending Application is starch, and current application claims of konjac mannan and another optional gelling agent, which can be starch as per dependent claim 8 of current application. Further gelling agents, such as konjac and starch are well known in the art for producing gelled products and thus, are obvious variants of each other, as evidenced by **Finnie (US 6391358)**. Finnie teaches of gelled compositions comprising konjac, pectin, gelatin (see examples 1 and 2, columns 9-10). Further in Column 11, lines 60-65, Finnie clearly states that "suitable thickening and gel forming agents that may find advantageous use with the present invention include at least: gelatin, xanthan, curdlan, agar, alginates, carrageenans, guar, locust bean gum, tara, methocel, fenugreek, pectin, gellan, other derivatives of cellulose, and starch." which makes the gelling agents recited in the two applications obvious variants of each other. Thus, claims 1-22 of current application and claims 1-3 and 8-20 of conflicting copending Application overlap in scope.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Objections

Claims 1-22 are objected to because of the following informalities:

In Claims 1-15, the article "A" should be added before "Packaged".

In Claims 1, 3, 4, 11, 16, 18, the parentheses should be removed around the phrase "weight % based on total packaged concentrate" or "weight % based on water content of concentrate."

Article "the" should be inserted before "total packaged or water content of concentrate."

Correction is required.

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Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 10 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 10 is indefinite for the use of improper Markush-type language in the recitation of the various elements (i.e. "comprising ... and/or..."). The claims should recite a group of elements using accepted U.S. Patent language:

(a) [open set]: "the ingredient **comprises** A, B, C, **or** D."

(b) [closed set]: "the ingredient is selected from the group **consisting of** A, B, C **and** D."

For the purposes of examination, the terms in the claim will be interpreted as "or".

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

- (A) Claims 1-11, 14-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morgan et al. (U.S. 2003/0044503), hereinafter Morgan, in view of Finnie et al (US 6391358), hereinafter Finnie.

Regarding **claim 1**, Morgan teaches a gel-based composition that can be used to enhance the flavor and/or texture of consumable food items (Page 1, Paragraph 1), i.e., a packaged concentrate for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning. Morgan further teaches that said composition comprises 15-80 weight % of water based on the total packaged concentrate (Page 2, Paragraph 25). Regarding the amount of salt and taste imparting components as recited in claim 1, Morgan teaches 0.1-60% of flavoring agents such as salt (Page 1, Paragraph 15), or 0.015-48 weight % of salt based on the water content of the concentrate, and 0.1-60 weight % of spices seasonings and flavoring agents, such as, yeast extracts and hydrolyzed meat proteins (Page 1, Paragraph 15 and Page 3, Paragraph 33), i.e., taste-imparting components which include applicant's recited range of 0.5 to 60% by weight of the package concentrate. Morgan teaches gel-based food products and further teaches a product with a consistency of canned jellied cranberry sauce (Page 1, Paragraphs 1 and 13) and various embodiments of sauces including garlic butter, barbeque and cheddar

cheese (Page 4, Examples 1-3), i.e., Morgan teaches that the composition or concentrate has the appearance of a gel. Morgan further teaches packaging the concentrate (Page 3, Paragraph 42). Regarding the overlapping of ranges between the invention and prior art composition it is noted that in the case where the claimed ranges "overlap or lie inside the ranges disclosed by the prior art" a prima facie case of obviousness exists (In re Wetheim, 541 F2d 257, 191 USPQ 90 (CCPA 1976); In re Woodruff, 919 F2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990)).

Regarding the gelling agent as recited in claims 1 and 4, Morgan teaches 0.3 to 20% of at least one functioning gelling agent (Page 2, Paragraph 25), i.e., 0.045-16 weight % based on the water content of the concentrate, which includes applicant's recited range of 0.8% to 4% of a gelling agent of claim 1 and 0.9%-2% as recited in claim 4. Gelling agent as taught by Morgan can be gelling proteins, gelling starches and gums (Page 1, Paragraph 15). Regarding gums or polysaccharide gelling agents, Morgan teaches that "Gums that are gelling agents can also be used". Morgan provides examples of gums having high hot viscosity and non-gelling properties and their respective utilities. Morgan states "Agar, for instance, can be used as a primary gelling agent. Gums that are not gelling agents can contribute to the overall viscosity of the system. Gums that impart medium to high hot viscosity, such as xanthan, guar, and locust bean gums and blends thereof, are important in maintaining the stability of suspended particulate flavoring and/or texturing agents." (Page 3, Paragraph 31). Thus, Morgan provides examples of gums including mannan gums, like locust bean gum and guar gum, but does not specifically teach konjac mannan, which is mannan comprised in flour of tuber *amorphillus konjac*. Konjac was well known in the art at the time of the invention as a thickening or gelling agent. Further utilization of konjac flour, which comprises konjac mannan, in combination with other gelling agents was also well known in the art at the time of the invention. For example, Finnie teaches of packaged thickening compositions including sauces, jelly dessert gels (Column 3, lines 66-67) where a gelling agent is combined with water (Figures 10-12, Column 6, lines 40-45). Regarding suitable gelling agents

Finnie teaches of konjac whose flour comprises glucomannan, i.e., konjac mannan. Finnie also teaches that konjac is synergistic with kappa carrageenan, xanthan and locust bean gum (Column 7, lines 32-43), i.e., konjac can be used in combination with other gelling agents. Regarding the amount of polysaccharide Finnie teaches an example of adding 1.5 weight % of the prepared sauce composition (Column 10, Example 2), i.e., the amount based in the weight of water in the sauce would be higher than 1.5%, which would fall in applicant's recited range for claims 1 and 4. Thus, konjac mannan was known to be utilized in gelled compositions in combination with other gelling agents like xanthan gum, as taught by Finnie. Thus, non starch polysaccharide gelling agents like gellan, locust bean gum, agar, xanthan, and konjac were well known in the art for forming gels and were used in combination or interchangeably in making gelled food products, (i.e., functional equivalents), as taught by Morgan and Finnie. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute one art recognized functional equivalent (i.e. a polysaccharide based gelling agent, such as agar or locust bean gum) for another (i.e. another polysaccharide gum konjac mannan) in the gelled food composition as disclosed by Morgan, depending on which gelling agents were more easily available and affordable at the time the invention was made. One of ordinary skill would have been motivated to modify Morgan at least for the purpose of utilizing a gelling agent that forms a gel rapidly with high pseudoplastic viscosity and where the gel structure is not affected by calcium, potassium or sodium, as disclosed by Finnie (Column 7, lines 38-43).

Regarding **claim 2**, Morgan as applied to claim 1 teaches a packaged concentrate wherein the concentrate has the rheology of a gel (Page 3, paragraph 42, lines 1-3).

Regarding **claim 3**, Morgan teaches 0.1-60% of flavoring agents, such as, salt (Page 1, Paragraph 15), or 0.015-48 weight % of salt based on the water content of the concentrate, which falls in applicant's recited range of 15-30% weight % based on water content of concentrate of salt.

Regarding **claims 5-7**, since Morgan in view of Finnie teach the claimed gel composition comprising the claimed amount of each component, it would be expected that the composition of Morgan, as applied to claim 1 would have the rheology of a gel and the other claimed parameters like elastic modulus, viscous modulus in the claimed range because it has been found that a component and its properties are inseparable. Therefore, if the claimed components are present, they would act or re-act in the same manner as claimed by Applicant. Furthermore, it has been found that "The PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his [or her] claimed product. Whether the rejection is based on inherency' under 35 U.S.C. 102, on prima facie obviousness' under 35 U.S.C. 103, jointly or alternatively, the burden of proof is the same...[footnote omitted]." The burden of proof is similar to that required with respect to product-by-process claims. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980) (quoting In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977)). MPEP 2112.V.

Regarding **claim 8**, Morgan teaches of other gelling agents wherein the one or more other gelling agents are selected from the group consisting of: agar, carrageenan, xanthan gellan, starch (Page 3, Paragraph 31).

Regarding **claim 9**, Morgan as applied to claim 1, teaches konjac mannan with at least one other gelling agent. Morgan is silent as to relative amounts of individual gelling agents, However, Finnie teaches of an example of combination of konjac mannan is 1.5% by weight and the other gelling agent (gelatin) is 6% by weight, i.e., each is present in an amount of 15-85% on the total amount of konjac mannan+ other gelling agent, and wherein the amount of konjac mannan 1.5% by weight of the composition, which meets the recited limitation of konjac mannan being at least 0.5% weight % based on water content of concentrate (as discussed above in claim 1). Thus, combination of gelling agents with relative proportions in applicant's recited range were known in the art at the time of the invention Therefore, it would have been obvious to

one of ordinary skill in the art at the time that the invention was made, for the packaged concentrate of Morgan to have further comprised a ratio of konjac mannan and other gelling agent in the claimed range, because Finnie teaches of combination of konjac with another gelling agent, such as, gelatin, in the relative proportions taught provides for firm product that after packaging and cooling provided a good gel that was firm to handle and would melt sufficiently to enrobe the material to which they are applied without flowing off (Column 10, lines 55-60). One of ordinary skill in the art would have been motivated by Finnie to use the two gums in the claimed range in order to prepare a highly viscous and strong gel product that stands up to packaging and is in the desired state once purchased and used by consumers.

Regarding **claim 10**, Morgan teaches of taste imparting components (Page 1, paragraph 15), wherein the taste-imparting components comprise sugar , salt, vinegar, fruit juice, vegetable juice, monosodium glutamate, dairy products which include one or more of liquid or dissolvable extracts or concentrates of herbs, fruit or vegetables, or flavors, or yeast extract, or hydrolyzed proteins or herbs, vegetables, fruits, as claimed.

Regarding **claim 11**, Morgan as applied to claim 1, teaches 15-80 weight % of water based on the total packaged concentrate (see Morgan, Page 2, Paragraph 25), which meets the limitation of the claimed amount of moisture present.

Regarding **claim 14**, Morgan as applied to claim 1 teaches that the concentrate comprises 5-40% weight per weight of fat or oil (see Morgan, Page 2, and Paragraph 16), wherein the concentrate includes applicant's recited range of 1-30% oil and/or fat .

Regarding **claim 15**, Morgan as applied to claim 1 teaches that the concentrate may be bagged, canned or frozen for extended shelf life (see Morgan, Page 3, Paragraph 42), wherein a can meets the limitations of a cup or tub with a seal.

Claim 16, recites a process for preparing a packaged concentrate where the concentrate has the same composition as recited in claim 1, except for the salt concentration, which is taught by Morgan, (page 1, paragraph 15). Therefore, the concentrate of claim 16, has been rejected over Morgan in view of Finnie for the same reasons as provided for claim 1. Regarding the process of preparing a concentrate, Morgan teaches wherein the ingredients are mixed together and heated to the melting point of the gelling agent to cause activation thereof and further teaches that once the gel structure has been achieved, concentrate may be bagged, canned or frozen for extended shelf life (see Morgan, Page 3, Paragraphs 39 and 42), wherein the canning would comprise filling and sealing of the can. Thus, Morgan in view of Finnie teaches the claimed process.

Claim 17, recites the same limitation as recited in claim 2, and is rejected for the same reasons over Morgan in view of Finnie as provided above for claim 2.

Claim 18, recites the same limitation as recited in claim 3, and is rejected for the same reasons over Morgan in view of Finnie as provided above for claim 3.

Regarding **claims 19 and 20**, Morgan teaches a step of heating to melting point of gelling agent to cause activation thereof (see Morgan, Page 3, paragraph 39) Morgan also teaches that the processing temperature must be high enough to hydrate functional amount of any starches and/or proteins in the composite formulation (Page 3, paragraph 42). However, the reference is silent as to the specific temperatures to which the product is heated to allow for hydration of starches and melting and activation of gelling agents. Finnie teaches that rapid forming gelling agents characteristically form gels at high temperatures, preferably above 65°C (Finnie, Column 7, lines 31-32). In a specific example comprising konjac and gelatin Finnie further teaches heating to a temperature of 76 °C (Column 10, lines 40-45), which includes applicant's recited range for temperature as recited in claims 19 and 20. Thus, it was known that heating melts

and activates gelling agents (Morgan, paragraph 39) and heating a composition comprising gelling agents, such as, konjac, pectin etc., in applicant's recited temperature range was also known at the time of the invention (Finnie Column 10, lines 40-45). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Morgan and heat the gelling agent composition within the claimed temperature range as taught by Finnie to melt the gelling agent in the composition. One of ordinary skill would have been motivated to modify Morgan at least for the purpose of hydrating the starches and proteins present in the gellable composition and also to activate the gelling agent to cause gelation or thickening (Morgan, page 3, paragraph 39 and Finnie Column 10, lines 40-45).

- (B) Claims **12-13 and 21-22** are rejected under 35 U.S.C. 103(a) as being unpatentable over Morgan (U.S. 2003/0044503), and Finnie (US 6391358), as applied to claim 1 above, further in view of Kuil et al. (EP 0970620), hereinafter Kuil.

Morgan in view of Finnie has been applied to claims 1-11, 14-20 under 35 U.S.C. 103(a) above.

Morgan in view of Finnie as applied to claim 1 above teach a gel-based composition that can be used to enhance the flavor and/or texture of consumable food items (Page 1, Paragraph 1), i.e., a packaged concentrate for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning. Regarding the limitations of water activity as recited in **claims 12-13**, since Morgan in view of Finnie teach moisture, salt, flavorings and gelling agents in the claimed amount, it would be expected that the concentrate would comprise the claimed water activity of between 0.7-0.78, as claimed. Further, it is noted that soup and sauce concentrates having water activity in the recited range of the applicant were known at the time of the invention, as taught by Kuil (Page 2, Column 2, lines 10-15), where Kuil teaches that the water activity of a soup/sauce concentrate

should be less than 0.92 and preferably between 0.7 to 0.9 (Page 3, Column 3, lines 5-12) to make a concentrate that has microbial safety at ambient conditions. Thus, water activity in applicant's recited range was known in soup and sauce concentrates, for enhancing the storage stability of the concentrate under ambient conditions. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Morgan and make a gelled concentrate product that has water activity in the claimed range. One of ordinary skill would have been motivated to modify Morgan at least for the purpose of making the gelled concentrated product that is more stable to microbial activity under ambient conditions (Kuil, Column 3, and lines 5-8).

Regarding **claims 21-22**, Morgan teaches a gelled product, including sauce, gels, however Morgan is silent about diluting the packaged concentrate with an aqueous liquid under application of heat, wherein the concentrate is diluted with the aqueous liquid in a ratio of 1:15-1:100. Soup and sauces were known to be available as concentrates at the time of the invention, e.g., canned soups have been well known in the art, some recommend a dilution of 1:1 or 1:2, such as tomato soup, however, some soups and sauces are available in concentrates that need much higher dilution, such as 1 teaspoon of mix can make an eight ounce serving. Kuil teaches of diluting concentrates to make ready-to-eat products, by adding about 4 to 10 parts aqueous liquid (Column 4, lines 23-31). Kuil also teaches of heating and stirring after dilution (Column 5, lines 33-36) and also teaches that actual ratio will depend on the amount of salt in the concentrate, amount of starch or thickener and desired end result (Column 4, lines 12-30). Thus, diluting concentrates to make soups or sauces was well known in the art at the time of the invention. It was also known that the actual amount of aqueous liquid added to dilute a concentrate would at least depend upon the concentration of the initial product, level of flavor or taste desired in the finished product and the thickness desired in the finished product. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Morgan and dilute a concentrate with an aqueous liquid in a desired amount under application of heat to make a product of

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desired taste, flavor and consistency (i.e., organoleptic experience desired), for consumption as such or for utilization for other desired culinary purposes.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 8:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jyoti Chawla/
Examiner, Art Unit 1781