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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/279,722	04/13/2006	Weizhu Yu	36650	8620
23589	7590	03/13/2013	EXAMINER	
Hovey Williams LLP 10801 Mastin Blvd., Suite 1000 Overland Park, KS 66210			PADEN, CAROLYN A	
			ART UNIT	PAPER NUMBER
			1791	
			MAIL DATE	DELIVERY MODE
			03/13/2013	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* WEIZHU YU  
and RICHARD B. JACKSON

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Appeal 2011-009979  
Application 11/279,722  
Technology Center 1700

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Before RICHARD E. SCHAFER, JEFFREY T. SMITH, and  
GEORGE C. BEST, *Administrative Patent Judges*.

BEST, *Administrative Patent Judge*.

DECISION ON APPEAL

On September 16, 2010, the Examiner rejected claims 1, 5, 6, 8, 10, 11, 13-15, 18-22, 25, 29, 31, 33, 34, and 36-38 of Application 11/279,722 under 35 U.S.C. § 103(a) as obvious. Appellants seek reversal of these rejections pursuant to 35 U.S.C. § 134(a). Because at least some of these claims have been previously rejected, *see, e.g.*, March 8, 2010 Office Action, we have jurisdiction under 35 U.S.C. § 6(b).

For the reasons set forth below, we REVERSE.

## BACKGROUND

The '722 application describes and claims a trans fat free emulsifier paste that can be used to prepare dough base. Spec. 1. Dough base is a product that typically contains fats, salt, sugar, and other ingredients. *Id.* To prepare a dough, bakers simply add flour, water, and yeast to the base. *Id.* The '722 application also describes and claims methods for preparing the trans fat free emulsifier paste. *Id.* at 2-3.

Claim 1 is representative of the '722 application's composition of matter claims and is reproduced below:

1. A trans fat free plastic composition comprising:

from about 5% to about 40% w/w of a high diglyceride emulsifier in which the diglyceride portion of the emulsifier is greater than about 65%;

from about 60% to about 95% w/w of a non-hydrogenated vegetable oil; and

an ingredient selected from the group consisting of sugar, dextrose, soy flour, wheat flour, gum, gluten, and mixtures thereof,

said composition being in the form of a solid plastic mass, wherein said % w/w are based upon the total mass.

(App. Br. 30 (Claims App'x)).

Claim 25 is representative of the '722 application's method claims and is reproduced below:

25. A method of preparing a trans fat free plastic composition for flour-based baked food products, said method comprising the steps of:

forming a melted blend by:

heating from about 5% to about 40% w/w of a high diglyceride emulsifier in which the diglyceride portion of

the emulsifier is greater than about 65% to a temperature above the melting point of the emulsifier; blending the heated emulsifier with from about 60% to about 95% w/w of a non-hydrogenated vegetable oil with similar temperature; and adding an ingredient selected from the group consisting of sugar, dextrose, soy flour, wheat flour, gum, gluten, and mixtures thereof; or

blending from about 5% to about 40% w/w of a high glyceride emulsifier in which the diglyceride portion of the emulsifier is greater than about 65% with from about 60% to about 95% w/w of a non-hydrogenated vegetable oil; heating the mixture of the emulsifier and vegetable oil to a temperature above its melting point; and adding an ingredient selected from the group consisting of sugar, dextrose, soy flour, wheat flour, gum, gluten, and mixtures thereof; and

cooling the melted blend of the emulsifier, vegetable oil, and ingredient, to form a solid plastic mass, wherein said % w/w are based upon the total mass.

(App. Br. 34 (Claims App'x)).

### REJECTIONS

The Examiner rejected claims 1, 5, 6, 8, 10, 11, 13-15, 18-22, 25, 29, 31, 33, 34, and 36-38 under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 5,879,735 ("Cain," issued March 9, 1999) in view of IRMA S. ROMBAUER & MARION ROMBAUER BECKER, JOY OF COOKING 338-342 (1997) ("Rombauer") and BECKY SUE EPSTEIN & HILARY DOLE KLEIN, SUBSTITUTING INGREDIENTS: AN A TO Z KITCHEN REFERENCE (3d ed.) 16 (1996) ("Epstein").

## DISCUSSION

The Examiner rejected claims 1, 5, 6, 8, 10, 11, 13-15, 18-22, 25, 29, 31, 33, 34, and 36-38 as obvious over the combination of Cain, Rombauer, and Epstein. The Examiner relies upon Cain's description of a variety of trans fat free compositions as the base of the rejection (Ans. 4-5). Rombauer is relied upon for its description of a roux (*id.* at 6), while Epstein teaches that margarine can be substituted for butter in cooking (*id.*).

Appellants seek reversal of this rejection on a variety of bases. Claims 1 and 25 are independent claims and are argued separately, as are dependent claims 18, 19, 22, 36, and 37 (App. Br. 12). For our purposes, however, we need only address the rejections of the two independent claims.

We begin, as we must, with claim construction. *Oakley, Inc. v. Sunglass Hut Int'l*, 316 F.3d 1331, 1339 (Fed. Cir. 2003). During prosecution, the '722 application's claims are given their broadest reasonable scope. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The words used in a claim must be read in light of the specification as it would be interpreted by one of ordinary skill in the art. *Id.* In particular, we must construe the phrase "wherein said % w/w are based on the total mass." This phrase, which appears in both of the independent claims, is ambiguous: Does it refer to the total mass of the claimed plastic composition or to the total mass of the high diglyceride emulsifier and vegetable oil in the plastic composition? As explained below, we conclude that this phrase has the latter meaning.

The '722 application describes a single preferred formulation for the plastic emulsifier composition of this invention. Spec. 6-7. That formulation is described as comprising 20% by weight soy bean oil and 5% by weight "high diglyceride." *Id.* at 7. If the claim language in question were construed

referring to the total mass of the plastic emulsifier composition, the plastic emulsifier composition disclosed in the Specification would not be within the scope of the claims. A claim construction that excludes the preferred embodiment is rarely, if ever, correct. *InterDigital Commc'ns, LLC v. U.S. Int'l Trade Comm'n*, 690 F.3d 1318, 1326 (Fed. Cir. 2012) (citing *Pfizer, Inc. v. Teva Pharm., USA, Inc.*, 429 F.3d 1364, 1374 (Fed. Cir. 2005); *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996)). Furthermore, a construction that interprets the claim language in question of referring to the total mass of the high diglyceride emulsifier and the vegetable oil places the preferred embodiment squarely within the scope of the '722 application's claims. We, therefore, construe the phrase "wherein said % w/w are based on the total mass" as referring to the total mass of the high diglyceride emulsifier and vegetable oil used in the plastic emulsifier composition.

Having construed the '722 application's claims, we next consider whether the Examiner erred in rejecting the application's claims as obvious over the combined teaching of Cain, Rombauer, and Epstein. As explained below, we reverse this rejection because the Examiner has not established a prima facie case of obviousness.

The Examiner found that Cain described or suggested every element of claims 1 and 25 except for the inclusion of the "an ingredient selected from the group consisting of sugar, dextrose, soy flour, wheat flour, gum, gluten, and mixtures thereof" in a solid plastic mass (Ans. 5-6). Appellants contend that this finding is erroneous in several respects (*see generally* App. Br. 13-30).

In particular, Appellants argue that Cain does not describe a composition that includes from about 60% w/w to about 95% w/w vegetable

oil, as required by the '722 application's independent claims for two reasons. (*id.* at 15-16).

*First*, Appellants argue that Cain does not describe the use of an amount of vegetable oil that falls within the scope of claim 1 (*id.*). Cain describes a composition as containing between 30 and 70% triglycerides, col. 3, ll. 11-27, which overlaps the range specified by claim 1. Appellants do not dispute that vegetable oils are triglycerides. Rather, they rely upon Cain's statement that liquid vegetable oils can be used as the triglyceride source, but preferably as "20-60 wt % of the triglyceride-component of our blend." Col. 3, ll. 52-64. Based upon this statement, Appellants assert that Cain describes the use of a maximum of 42% vegetable oil (App. Br. 16). This argument is not persuasive because Cain specifically states that the use of 20-60 wt % vegetable oil as a triglyceride source is a preferred embodiment and does not provide any description or suggestion that the use of 100 wt % vegetable oil as the triglyceride source would lead to failure. The preferred embodiment described in Cain, therefore, does not detract from Cain's description of a composition comprising between about 30 to about 70 wt % triglyceride. Accordingly, The Examiner did not err in finding that Cain describes the use of a triglyceride source comprising amounts of vegetable oil that overlaps the claimed range of about 60% w/w to about 95% w/w vegetable oil.

*Second*, Appellants argue that Cain's use of vegetable oil as a triglyceride source is not a description of actually using the vegetable oil in Cain's composition (Reply Br. 5). Cain describes the use of vegetable oil as a triglyceride source. Col. 3, ll. 52-64. Cain then describes the glycerolysis of its triglyceride source either by chemical or enzymatic means to produce a mixture of di- and tri-glycerides. Col. 4, ll. 46-50; col. 4, ll. 57-66. Cain

further states that the triglycerides produced by this procedure are different from those in the starting composition. Col. 4, ll. 57-62. While Cain does say that the manmade fat blends produced by glycerolysis can be mixed with a liquid oil to obtain a final blend having desirable properties, Cain does not describe the amount of liquid oil that might be used in such situations. Col. 5, ll. 3-27. Furthermore, in each of Cain's examples, a composition having the desired properties was produced by mixing a series of manmade fat blends without the addition of any vegetable oil. *See generally* col. 5, l. 42-col. 8, l. 67. Because Cain describes the transformation of most, if not all, of its triglyceride source into manmade fat blends comprising triglycerides that differ from those in the starting material, the Examiner erred in finding that Cain described or suggested the use of 30-70 wt % vegetable oil in its composition. For this reason we reverse the Examiner's rejection of Claim 1.

Furthermore, claim 25 specifically requires blending the high diglyceride emulsifier with "from about 60% to about 95% w/w of a non-hydrogenated vegetable oil." The Examiner's error regarding Cain's description means that the Examiner also did not establish a prima facie case of obviousness of this claim. We, therefore, reverse the rejection of claim 25.

The remaining claims in the '722 application depend from either claim 1 or claim 25. The rejection of these claims must also be reversed because the Examiner failed to demonstrate a prima facie case of obviousness of each of these claims for at least the reasons set forth above.

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## CONCLUSION

For the foregoing reasons, we reverse the Examiner's rejection of claims 1, 5, 6, 8, 10, 11, 13-15, 18-22, 25, 29, 31, 33, 34, and 36-38.

REVERSED

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