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Arent Fox LLP 555 West Fifth Street 48th Floor Los Angeles, CA 90013			ZILBERING, ASSAF	
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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* BEREND JAN ARENDS,  
CHRISTIAAN MICHAEL BEINDORFF,  
ALBERT JAN BEZEMER, and TEUNIS DE MAN<sup>1</sup>

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Appeal 2018-007784  
Application 14/359,133  
Technology Center 1700

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Before BEVERLY A. FRANKLIN, CHRISTOPHER C. KENNEDY, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

KENNEDY, *Administrative Patent Judge*.

DECISION ON APPEAL

This case is an appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1–3, 5–11, and 13. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> The Appellant is the Applicant, Unilever BCS US, Inc., which is also identified as the real party in interest. *See* App. Br. 2. The Appellant states that UNILEVER BCS US, INC., is a member of the Unilever Group headed by Unilever N.V. and Unilever PLC, and that “Unilever has announced that its spreads business, to which the current application relates, is being sold to KKR pending regulatory matters.” App. Br. 3.

## BACKGROUND

The subject matter on appeal relates to processes for preparing edible fat-continuous spreads such as margarine. *E.g.*, Spec. 1:5–11; Claim 1. Claim 1 is reproduced below from page 10 (Claims Appendix) of the Appeal Brief:

1. Process for the preparation of an edible fat-continuous spread comprising a water phase and at most 45 wt. % of fat using liquid oil and a fat powder comprising structuring fat, comprising the steps of:
  - a. providing a mixture comprising the water-phase and the fat powder, a water-continuous slurry is formed by dispersing the fat powder in the water-continuous phase;
  - b. subjecting said mixture to at least a partial vacuum;
  - c. mixing the mixture prepared at step ‘b’ to provide a fat-continuous spread,

wherein the liquid oil may be added to the mixture at any of steps ‘b’, or ‘c’ or when added in parts in any combination at steps ‘b’ and ‘c’.

## REJECTIONS ON APPEAL

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

1. Claims 1–3, 6–11, and 13 over Barendse (WO 2006/087091 A2, published Aug. 24, 2006);
2. Claim 5 over Barendse and Münüklü (P. Münüklü et al., *Particle formation of edible fats using the supercritical melt micronization process (ScMM)*, 43 J. Supercritical Fluids 181 (2007)).

## ANALYSIS

The Appellant argues the claims as a group. We select claim 1 as representative, and the remaining claims will stand or fall with claim 1.

After review of the cited evidence in the appeal record and the opposing positions of the Appellant and the Examiner, we determine that the Appellant has not identified reversible error in the Examiner's rejections. Accordingly, we affirm the rejections for reasons set forth below, in the Final Action, and in the Examiner's Answer. *See generally* Final Act. 2–7; Ans. 3–8.

The Examiner finds that Barendse teaches a process nearly the same as that of claim 1, but that Barendse's process involves first mixing fat powder with oil, and then mixing with water, rather than first mixing fat powder with water, and then mixing with oil, as required by claim 1. Final Act. 3–4. In other words, the Examiner finds that the processes are the same except for the sequence of mixing the ingredients. However, the Examiner determines:

[I]t would have been obvious to a skilled artisan to form the fat continuous spreads following the order of steps recited in the claims as the order of steps recited in the claims is an obvious variant of the order of steps of forming the fat continuous spreads disclosed in Barendse. As set forth in MPEP §2144.04, selection of any order of performing process steps, or mixing ingredients, is *prima facie* obvious in the absence of new or unexpected results.

*Id.*

In the Appeal Brief, the Appellant first points out that Barendse discloses that its fat powder/oil mixture may be mixed with either water or a solid phase. App. Br. 8 (“Barendse is not limited to dispersing water in the fat phase which is made from the oil and solid structuring fat; it can disperse a solid into the fat phase.”).

Even accepting that as accurate, that is not indicative of reversible error in the Examiner's rejection because the fact that Barendse's fat powder/oil mixture may be mixed with a solid does not detract from Barendse's disclosure of mixing the fat powder/oil mixture with water.

The Appellant next argues that Barendse adds water to a fat powder/oil mixture, whereas the claims require adding oil to a fat powder/water mixture. App. Br. 8–9.

Even accepting that as accurate, that argument is unpersuasive of reversible error in the Examiner's rejection because it fails to address the Examiner's determination that simply rearranging the sequence of steps, or the sequence in which ingredients are mixed, is *prima facie* obvious. *See* Final Act. 3–4; *see also In re Burhans*, 154 F.2d 690, 692 (CCPA 1946); *see also In re Gibson*, 39 F.2d 975, 976–77 (CCPA 1930) (selection of any order of mixing ingredients is *prima facie* obvious). The burden of showing that unexpected results rebut the *prima facie* case of obviousness rests with the Appellant, *In re Huang*, 100 F.3d 135, 139 (Fed. Cir. 1996), and the Appellant has not shown that unexpected results support a conclusion of nonobviousness in this case.

In the Reply Brief, the Appellant for the first time addresses the Examiner's sequence-of-steps obviousness rationale and also raises a separate argument concerning the Examiner's rejection of claim 5. We decline to consider those arguments because they are untimely, and the Appellant has not attempted to show good cause for presenting them for the first time in the Reply Brief. *See* 37 C.F.R. § 41.41(b)(2).

We affirm the Examiner's rejections.

CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-3, 5-11, 13	§ 103(a)	1-3, 5-11, 13	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED