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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/582,483	12/24/2014	Cornelia Sophia Maartje van den BERG	039676.00053	7322
68543	7590	09/30/2020	EXAMINER	
Arent Fox LLP - Los Angeles 555 West Fifth Street 48th Floor Los Angeles, CA 90013			PRAKASH, SUBBALAKSHMI	
			ART UNIT	PAPER NUMBER
			1793	
			NOTIFICATION DATE	DELIVERY MODE
			09/30/2020	ELECTRONIC

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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* CORNELIA SOPHIA MAARTJE VAN DEN BERG,  
ECKHARD FLOTTER, GERRIT JAN W. GOUDAPPEL,  
JOHANNES JOZEF M. JANSSEN, XAVIER YVES LAUTESLAGER,  
GAUTAM SATYAMURTHY NIVARTHY, and  
FRANK EMILE WUBBOLTS

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Appeal 2019–005376  
Application 14/582,483  
Technology Center 1700

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BEFORE ROMULO H. DELMENDO, BEVERLY A. FRANKLIN, and  
CHRISTOPHER C. KENNEDY, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner’s decision to reject claims 22–32. We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Unilever. Appeal Br. 3.

We AFFIRM.

### CLAIMED SUBJECT MATTER

Claim 22 is illustrative of Appellant’s subject matter on appeal and is set forth below:

22. A process for the preparation of an edible dispersion comprising a) oil and structuring agent and b) an aqueous phase, comprising forming the dispersion by mixing i) oil, ii) solid structuring agent particles comprising edible fat having a microporous structure of submicron size particles, and iii) the aqueous phase, wherein the solid structuring agent particles were made by (I) preparing a homogeneous mixture of A) structuring agent and B) liquefied gas or supercritical gas, at a pressure of 5-40 MPa and (II) expanding the mixture through an orifice, in which the structuring agent was solidified, said edible dispersion comprising a water-in oil emulsion.

### REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Weidner et al.	US 6,056,791	May 2, 2000
van den Berg et al.	US 8,025,913 B2	Sept. 27, 2011
van den Berg et al.	US 8,940,355 B2	Jan. 27, 2015
N. Garti et al., “Stabilization of Water-in-Oil Emulsions by Submicrocrystalline $\alpha$ -Form Fat Particles” JAOCS, vol. 75, no. 12 (1998).		
P. Munuklu et al., “Particle formation of an edible fat (rapeseed70) using the supercritical melt micronization (ScMM) process”, <i>J. of Supercritical Fluids</i> , 40 pp 433–442 (2007).		

### THE REJECTIONS

1. Claims 22–32 are rejected under pre-AIA 35 USC § 103(a) as being unpatentable over Garti in view of Weidner as evidenced by a review in Munuklu, both cited by the applicants in an IDS filed 8/5/2016.

2. Claims 22–32 are rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–30 of U.S. Patent No. 8,025,913 B2 and claims 1–38 of US Patent No. 8,940,355 B2.<sup>2</sup>

#### OPINION

We review the appealed rejections for error based upon the issues Appellant identifies, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”). After considering the argued claims and each of Appellant’s arguments, we are not persuaded of reversible error in the appealed rejections.

Appellant does not make separate arguments in support of patentability of any particular claim or claim grouping. Accordingly, the claims subject to each ground of rejection will stand or fall with claim 22. *See* 37 C.F.R. § 41.37(c)(iv).

We refer to pages 3–6 of the Answer regarding the Examiner’s statement of the rejection for Rejection 1.

Beginning on page 5 of the Appeal Brief, Appellant states that the Examiner asserts (Final Act. 7) that a process for making the structuring agent particles is not considered in determining patentability because the claimed method is applicable to making a water-in-oil emulsion with structuring particles made by any other method. Appellant argues that the method of making the structuring agent particles recited in the “wherein”

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<sup>2</sup> This rejection is summarily affirmed as Appellant states a terminal disclaimer will be filed upon indication of allowability. Appeal Br. 9.

clause of claim 22 should be accorded full weight. Implicit in the Examiner’s position is that this aspect of the claim is a product-by-process limitation for an ingredient that is used in the claimed process rather than additional process steps defining the claimed process for preparing an edible dispersion. Hence, it is the product itself, which is used in the claimed process as an ingredient for preparing an edible dispersion, that must be shown to be different to impart a meaningful difference in terms of the claimed process relative to the prior art process. “Where a product-by-process claim is rejected over a prior art product that appears to be identical, although produced by a different process, the burden is upon the applicants to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product.” *Cf. In re Marosi*, 710 F.2d 799, 803 (Fed. Cir. 1983); *In re Thorpe*, 777 F.2d 695, 697 (Fed. Cir. 1985) (“If the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.”). In the instant case, Appellant has not come forward with such evidence so we are unpersuaded by this line of argument.

Appellant next argues that aside from the above-mentioned issue, the claims still recite that the particles have a microporous structure of submicron particles, and that the Examiner has not established that Garti’s particles have a microporous structure of submicron particles or what is exactly their flash cooling process. Appeal Br. 6–7.

Appellant also argues that the rejection combines Garti with Weidner but that this combination is based on hindsight from Appellant’s disclosure. Appellant argues that Weidner discloses a process for preparing particles or

powders, but asserts that the Examiner points to no teaching that it should be used in the present process wherein particles stabilize an emulsion. Appeal Br. 8.

Appellant also argues that Garti produces solid fat in oil whereas Weidner produces particles or powders. Appeal Br. 8. Appellant argues that it is not seen how these references could be combined without negating the Garti process, asserting that Weidmar teaches a process wherein the solid particles produced are free of solvent (Weidner, col. 7, l. 27). *Id.*

We are unpersuaded by the aforementioned arguments. As stated by the Examiner on page 8 of the Answer, Garti discloses submicron sized particles of a solid structuring agent (Garti, p. 1828, col. 1), and further discloses that submicron particles (less than 0.1 micron), with narrow size distribution and as spherical as possible in shape, would need to be obtained in the oil phase in order to achieve good anchoring, with good wetting, at the water interface in making a water-in-oil emulsion with such particles (Garti, p. 1828, col. 1). Ans. 8. We agree.

The Examiner further states that Garti discloses a flash cooling step in making such particles (Garti, p. 1829), which is known to be achieved by various methods. Ans. 8. The Examiner states that alternative methods for making microparticles of edible fat wherein submicron particles with narrow size distribution are obtained are taught in Weidner. Ans. 8. The Examiner states that Weidner teaches a method wherein liquefied gas or supercritical fluids, such as carbon dioxide in a melt of a fat or fat derivative, is expanded through an orifice under suitable conditions to obtain particles with desired properties. The Examiner states that Weidner further discloses that having a gas stream along with a sprayed liquid stream of supercritical gas and fat/fat-

derivative produces smaller particles than those obtained with the sprayed liquid stream alone (Weidmar, col. 8 ll. 3–16, working examples 4 and 8).  
Ans. 8–9. We agree.

Regarding Appellant’s aforementioned argument that combining the disclosures in Garti and Weidner is based on hindsight reasoning, we are unpersuaded by this line of argument. We refer in part to the Examiner’s response made on pages 9–10 of the Answer. Therein, the Examiner explains that Garti discloses submicron sized particles of a solid structuring agent (page 1828 column 1), and further discloses that submicron particles (less than 0.1 micrometer), having narrow size distribution, and being as spherical as possible in shape, would need to be obtained in the oil phase in order to achieve good anchoring, with good wetting, at the water interface in making a water-in-oil emulsion with such particles. The Examiner states that Garti thus recognizes the criticality of obtaining submicron sized particles with narrow size distribution and being spherical in shape for application as a structuring agent in water-in-oil emulsions. The Examiner reiterates that alternative methods to make microparticles of edible fat wherein submicron particles having narrow size distribution and a range of morphological characteristics are obtained, are taught by Weidner. Ans. 10. The Examiner states that Weidner teaches the suitability of the method for use in particulating temperature sensitive materials. Ans. 10. Weidner teaches that in conventional processes, the use of considerable heating is disadvantageous. Weidner, col. 1, ll. 20–25.

Regarding Appellant’s aforementioned argument that Weidner discloses solid particles that are “free of solvent” (Weidner, col. 7, l. 27), the Examiner explains that this particular teaching is in connection with the

advantages of Weidner’s process, in that unlike a conventional process involving the use of solvents, a process of producing particles from gas saturated solutions (PGSS) does not require a step of solvent recovery and disposal. Ans. 11.

### CONCLUSION

We affirm the Examiner’s decision.

### DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
22–32	103(a)	Garti, Weidner, Munuklu	22–32	
22–32		Nonstatutory Double Patenting	22–32	
<b>Overall Outcome</b>			<b>22–32</b>	

### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED