

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 39

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* AXEL HORST BORLINGHAUS

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Appeal No. 2001-2492  
Application 08/817,277

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ON BRIEF

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Before PAK, OWENS, and KRATZ, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

*DECISION ON APPEAL*

This appeal is from the final rejection of claims 11-13 and 15-18, which are all of the claims remaining in the application.

*THE INVENTION*

The claimed invention is directed toward a method for making a beverage. Claim 11 is illustrative:

11. A method of preparing a beverage comprising the steps of:

(a) providing a transportable, non-homogenized flavor composition, said flavor composition comprising at least one aqueous phase compound, at least one oil phase compound, and at least one edible acid,

wherein said flavor composition is provided in a unitized quantity corresponding to an integer part of a single batch mixture of the beverage, said integer being greater than 0; and

wherein said flavor composition is concentrated such that said aqueous phase compound and said oil phase compound separate noticeably at 20°C within 2 hours when exposed only to gravitational forces;

(b) providing a locally available dilution composition, said dilution composition comprising water; and

(c) mixing said flavor composition with 200 or more parts of said dilution composition per part of said flavor composition, without prior homogenizing and without prior metering of said flavor composition to provide a single batch mixture of the beverage.

*THE REFERENCES*

Davis, Jr. et al. (Davis) 4,830,870 May 16, 1989

*Elements of Food Technology* 667-68 (Norman W. Desrosier ed., Avi Publishing Co. 1977).

Olindo Secondini, *Handbook of Perfumes and Flavors* 17-20, 74-76 (Chemical Publishing Co. 1990).

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*Food Flavorings* 106, 113, 114, 175, 178, 179 (P.R. Ashurst ed., Blackie Academic & Professional 1995) (Ashurst).

*THE REJECTION*

Claims 11-13 and 15-18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Davis in view of Ashurst, *Secondini and Elements of Food Technology*.

*OPINION*

We reverse the aforementioned rejection. We need to address only claim 11, which is the sole independent claim.

The portion of Davis relied upon by the examiner (answer, page 3) is the control beverage concentrate in example 2, which has the following composition (col. 4, lines 34-45):

<i>Component</i>	<i>Weight percent</i>
Water	93.4
Citric acid	4.6
Lemon oil emulsion	0.8
Potassium citrate	0.7
Aspartame	0.3
Preservatives	<u>0.2</u>
	100.0

This concentrate is diluted with water at a 5:1 water-to-concentrate ratio (col. 4, lines 50-51).

The portions of Ashurst relied upon by the examiner (answer, pages 3-4) are the strawberry essence/water volumetric ratio in the strawberry milk-based beverage in table 6.11 (page 175), and

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the lemon essence/water ratio in the lemonade composition in table 6.16 (page 179).

The examiner relies upon Elements of Food Technology (pages 667-68) and Secondini (pages 17-20 and 74-76) for descriptions of essences (answer, page 4).

The examiner argues that oil and water are known to separate (answer, page 3). The examiner, however, has not established that the 0.8 wt% of lemon oil emulsion in Davis' control composition would separate from the 93.4 wt% water at all, let alone within 2 hours at 20°C when exposed only to gravitational forces as required by the appellant's claim 11.

The examiner argues that "[n]othing new or unobvious is seen in making a flavoring composition that is extremely concentrated so that it must be diluted with 200 parts of water" (answer, page 3). For a *prima facie* case of obviousness to be established, however, the teachings from the prior art itself must appear to have suggested the claimed subject matter to one of ordinary skill in the art. See *In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976). The mere fact that the prior art could be modified as proposed by the examiner is not sufficient to establish a *prima facie* case of obviousness. See *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed.

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Cir. 1992). The examiner has not established that the applied prior art itself would have led one of ordinary skill in the art to dilute Davis' control composition, which is disclosed as being diluted 5:1 (col. 4, lines 50-51), by a factor of at least 200:1.<sup>1</sup>

We therefore find that the examiner has not set forth a factual basis which is sufficient to support a conclusion of *prima facie* obviousness of the appellant's claimed invention.

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<sup>1</sup> If the examiner considers any particular component of Davis' control concentrate to be the appellant's flavor composition, then the examiner has not established that the component has an oil phase and an aqueous phase which separate noticeably at 20°C within 2 hours when exposed only to gravitational forces as required by the appellant's independent claim.

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*DECISION*

The rejection of claims 11-13 and 15-18 under 35 U.S.C. § 103 over Davis in view of Ashurst, Secondini and Elements of Food Technology, is reversed.

*REVERSED*

	)	
CHUNG K. PAK	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
TERRY J. OWENS	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
PETER F. KRATZ	)	
Administrative Patent Judge	)	

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