

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte STANSLAW TOLPA, TADEUSZ GERSZ,  
STANISLAWA RITTER, RYSZARD KUKLA,  
MALGORZATA SKRYSZEWSKA  
and STANISLAW TOMKOW

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Appeal No. 94-3436  
Application 07/849,490<sup>1</sup>

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ON BRIEF

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Before RONALD H. SMITH, METZ and PAK, Administrative Patent Judges.

RONALD H. SMITH, Administrative Patent Judge.

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<sup>1</sup> Application for patent filed March 11, 1992.

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This is an appeal from the final rejection of claims 1-6, 15-19 and 30-34. Claim 21 has been cancelled, and all other claims have been withdrawn pursuant to a restriction requirement.

The subject matter of the appealed claims relates to a water soluble peat-derived bioactive product. Claim 1, the only independent appealed claim, reads as follows:

1. A water soluble peat-derived bioactive product containing not more than 70% by weight sodium chloride, based on dry mass.

The reference relied upon by the examiner is:

Belkevich et al. (Belkevich)                      4,272,527                      June 9, 1981

Our decision is based on a review of the record including Appellants' appeal brief, the examiner's answer, the reply brief, the two supplemental examiner's answers, the supplemental reply brief, the specification and the declaration of Dr. Kukla. The review of the record indicates that the only remaining rejection of the claims is based on the Belkevich reference under 35 U.S.C. § 102 or 103. We will not sustain this rejection.

The claims are directed to a water soluble peat-derived product. Belkevich discloses an ethanol extraction of peat wax resin, which is disclosed by Belkevich at column 1, lines 20-23 to contain sterols and estrogenic compounds. The sterols and estrogenic compounds are the only disclosed ingredients of the

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ethanol extract taught by Belkevich. The sterol and estrogen compounds in Belkevich's extract are not water soluble as pointed out in paragraph 3 of the Kukla declaration. Plainly, Belkevich does not describe, in the sense of 35 U.S.C. § 102, or suggest to the person of ordinary skill in the art a water soluble peat-derived bioactive product.

The examiner's rejection as it is founded on 35 U.S.C. § 103 is apparently based on speculation that the Belkevich extract could "conceivably contain water soluble components in addition to the [disclosed] water insoluble components." However, silence in a reference is hardly a proper substitute for an adequate disclosure of facts from which a conclusion of obviousness may justifiably follow. In re Burt, 356 F.2d 115, 121, 148 USPQ 548, 553 (CCPA 1966).

The decision of the examiner is reversed.

REVERSED

RONALD H. SMITH )  
Administrative Patent Judge )  
ANDREW H. METZ )  
Administrative Patent Judge ) BOARD OF PATENT  
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)  
) INTERFERENCES  
)  
CHUNG K. PAK  
Administrative Patent Judge )

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