

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 51

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PHILIP HERVE

Appeal No. 95-0055
Application No. 07/985,354

ON BRIEF

Before WARREN, WALTZ, and LIEBERMAN, Administrative Patent Judges.

WALTZ, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the examiner's refusal to allow claims 45 through 65, as amended after the final rejection (see the amendment dated Dec. 20, 1993 (Paper No. 25), and the Advisory Action dated Feb. 3,

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1993 (Paper No. 26)). Claims 45 through 65 are the only claims remaining in this application.

According to appellant, the invention relates to a biological activator for a septic tank comprising in admixture particles of a kaolinite and particles of an essentially vitreous material (Brief, pages 3-4). Claim 45 is illustrative of the subject matter on appeal and a copy of claim 45 is reproduced below:

45. A biological activator for a septic tank which activator comprises particles of essentially vitreous materials and kaolinite.

The examiner has relied upon the following references as evidence of obviousness:

Bavaveas	4,213,871	Jul. 22, 1980
Eparco S.A. (French Patent) ¹	2 357 490	Feb. 3, 1978

Claims 45 through 65 stand rejected under 35 U.S.C. § 103 as unpatentable over French Patent 2 357 490 or Bavaveas

¹An English translation of this reference is of record. However, as noted by appellant (Brief, page 5, footnote 1), French Patent 2 357 490 is the priority document for Bavaveas. Neither appellant nor the examiner, in the record before us, has pointed to any difference between these references. Accordingly, we need only discuss and refer to Bavaveas in our decision.

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alone, optionally taken with appellant's admission on page 9, lines 12-17, of the specification regarding EPARCYL® (Answer, page 2).² Upon careful review of the record, including the respective positions of the examiner and appellant in the Answer and the Brief,³ we reverse this rejection for reasons which follow.

OPINION

The biological activator of appealed claim 45 comprises "particles of essentially vitreous materials and kaolinite." The "essentially vitreous materials" of appealed claim 45 include zeolites (see appealed claim 46 or the specification, the sentence bridging pages 3-4).

The examiner finds that a finely divided zeolite product is specifically identified in the French reference (Answer, page 3). Bavaveas discloses a biological activator

²The final rejection of claims 47-50 and 58-62 under the first and second paragraphs of 35 U.S.C. § 112 has been withdrawn by the examiner in view of the amendments and response dated Dec. 20, 1993, Paper No. 25 (see the Advisory Action dated Feb. 3, 1994, Paper No. 26).

³Appellant's Reply Brief dated Sept. 6, 1994 (Paper No. 34), was refused entry by the examiner (Letter dated Sept. 19, 1994, Paper No. 35) and thus has not been considered in our review.

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"constituted by a clay compound" (column 1, lines 55-57) with non-limiting chemical compositions as taught in column 2, lines 31-39. We find no evidence, on this record, that the "clay compound" disclosed by Bavaveas is inclusive of "essentially vitreous materials" such as zeolites.⁴

The examiner further concludes that "[t]he use of a finely divided vitreous solid alone, or with a coarser ground kaolin as the solid material, each of which is within the scope of Bavaveas or the French reference, would also have been an obvious expedient." (Answer, page 3, see also the Brief, page 5). Although kaolin is a type of clay⁵ and thus within the scope of Bavaveas, the examiner has failed to point to any disclosure or suggestion in Bavaveas to support the finding that an essentially vitreous material is within the

⁴The word "vitreous" is not defined in the specification but is commonly used to mean "glassy". See *Hackh's Chemical Dictionary*, 3rd ed., p. 899, The Blakiston Co., 1953, a copy of which is attached to this decision.

⁵See *The Condensed Chemical Dictionary*, 5th ed., p. 286, Reinhold Publishing Corp., 1956, a copy of which is attached to this decision. It is also noted that appellant discloses that "[k]aolinite particles are used *per se* as biological activators." (Specification, page 1, lines 22-23).

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scope of this reference (see the Brief, page 7, penultimate paragraph).

Similarly, the examiner has failed to support his contention that appellant's disclosure of "EPARCYL®" is an "admission that mixtures of chabazite and phillipsite [natural zeolites]... are known biological activators" (Answer, page 3). The disclosure on page 9, lines 12-17, of the specification must be taken in context with the disclosure at page 2, lines 6-7, that ZEOPORT B180 alone is a mixture of natural zeolites and is not known to be suitable as a biological activator (specification, page 4, lines 8-17, see the brief, page 8, penultimate paragraph). The "prior biological activator" EPARCYL® (specification, page 9) is a natural clay material (see Exhibit 1 attached to the amendment dated Oct. 15, 1991, Paper No. 9, in parent Application No. 07/492,713). There is no evidence in this record that mixtures of chabazite and phillipsite were known biological activators or that EPARCYL® contains any vitreous material or zeolites.

For the foregoing reasons, we determine that the examiner's legal conclusion of obviousness is not supported by

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the facts. "Where the legal conclusion of obviousness is not supported by facts it cannot stand." *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967). Since we reverse on the basis that the examiner failed to establish a *prima facie* case of obviousness, we need not reach the issue of the sufficiency of the showing of unexpected results in the Rambaud Declarations dated June 17, 1993, and December 15, 1993 (see the Brief, pages 10-14). *In re Geiger*, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). Accordingly, the examiner's rejection of claims 45 through 65 under 35 U.S.C. § 103 as unpatentable over French Patent 2 357 490 or Bavaveas alone, or optionally taken with appellant's admission at page 9, lines 12-17, of the specification regarding "EPARCYL®" is reversed.

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The decision of the examiner is reversed.

REVERSED

CHARLES F. WARREN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
PAUL LIEBERMAN)	
Administrative Patent Judge)	

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APJ WALTZ

APJ LIEBERMAN

APJ WARREN

DECISION: REVERSED
Send Reference(s): Yes No
or Translation (s)
Panel Change: Yes No
Index Sheet-2901 Rejection(s): _____

Prepared: January 28, 2002

Draft Final

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OB/HD GAU

PALM / ACTS 2 / BOOK
DISK (FOIA) / REPORT