

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(2) is not binding precedent of the Board.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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DANE DICKSON, STEPHEN M. COSTA
and EZRA A. THEYS

Appeal No. 1999-2323
Application 08/434,519

ON BRIEF

Before FRANKFORT, MCQUADE and BAHR, Administrative Patent
Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final
rejection of claims 1 through 11, all of the claims pending in
this application.

Appeal No. 1999-2323
Application No. 08/434519

Appellants' invention relates to a spill resistant insect bait station for destroying insects. A copy of representative claim 1 on appeal is attached to this decision.¹

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Moore	2,234,500	Mar. 11,
1941		
Morris	4,485,582	Dec. 4,
1984		
Demarest et al.	5,033,229	Jul. 23,
1991		
(Demarest '229)		
Wefler	5,548,922	Aug.
27, 1996		
	(filed Jan. 11, 1995)	

Claims 1 and 8 through 11 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Wefler.

¹ Like the examiner (answer, page 3), we note that the copy of the claims contained in the Appendix to appellants' brief is not a correct copy of the claims on appeal.

Appeal No. 1999-2323
Application No. 08/434519

Claim 2 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Wefler in view of Moore.

Claim 3 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Wefler in view of Morris.

Claims 4 through 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Wefler in view of Demarest '229.²

Rather than reiterate the examiner's full statement of the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellants regarding the rejections, we make reference to the examiner's answer (Paper No. 19, mailed March 8, 1999) for the reasoning in support of the rejections and to appellants' brief (Paper No. 18, filed

² As noted on page 2 of the examiner's answer, the rejection of claims 1 through 9 under 35 U.S.C. § 112, second paragraph, has now been withdrawn by the examiner in light of certain proposed amendments found in Attachment A of appellants' brief. It follows that appellants should formally submit an appropriate amendment during any further prosecution of the application before the examiner including the currently proposed, and now apparently approved, changes.

Appeal No. 1999-2323
Application No. 08/434519

January 19, 1999) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, this panel of the Board has given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have reached the determinations which follow.

Looking first to the examiner's rejection of claims 1 and 8 through 11 under 35 U.S.C. § 102(e) based on Wefler, we are in agreement with the examiner's position as set forth on pages 4 through 6 of the answer, wherein the examiner has specifically read the rejected claims on Wefler's insect bait station seen in Figures 5 and 6 of the patent. Like the examiner, we note that appellants' argument in their brief (pages 7-9) that Wefler does not use or disclose granular bait, is of no moment since there is nothing in appellants' claims 1 and 8 through 11 on appeal which requires that the

Appeal No. 1999-2323
Application No. 08/434519

recited insect bait station include, or specifically be capable of use with, granular bait.

In light of the foregoing, since we find clear correspondence between the structure set forth in claims 1 and 8 through 11 on appeal and that seen in Wefler Figures 5 and 6, we will sustain the examiner's rejection of claims 1 and 8 through 11 under 35 U.S.C. § 102(e) based on Wefler.

Regarding the examiner's rejection of claim 2 under 35 U.S.C. § 103(a) as being unpatentable over Wefler and Moore, and the rejection of claim 3 under 35 U.S.C. § 103(a) as being unpatentable over Wefler and Morris, we note that claim 2 sets forth that the bait of claim 1 is a "granular bait" and that claim 3 sets forth that the bait of claim 1 is a "paste bait." While it is true that Moore and Morris, respectively, provide evidence that granular and paste baits were known in the art, we must agree with appellants that there is no apparent reason in the applied prior art as to why one of ordinary skill in the art at the time of appellants'

Appeal No. 1999-2323
Application No. 08/434519

invention would have been led to modify the insect bait station of Wefler, which is specifically designed to be used with a liquid insect bait, to accommodate a granular bait or a paste bait. Contrary to the examiner's position as stated on page 11 of the answer, we see no way that the insect bait station of Wefler can be said to be "capable of employing" either granular or paste baits. In describing the relied upon embodiment seen in Figures 5 and 6 of Wefler, it is noted (col. 4, lines 44-50) that the porous pad (152) is held with sufficient force between the floor (118) and the stage (124) of the insect station such that its upper surface (154) substantially closes the stage feeding windows (150) and thereby prevents or at least substantially restrains the liquid insect bait within the holding chamber (132) from spilling out through the stage feeding windows. Thus, given that the porous pad (152) seen in Figures 5 and 6 of Wefler closes the feeding windows (150), it is clear that a granular or paste bait used in this insect station would not be accessible via the feeding windows, and that absent disassembly of the Wefler station and removal of the porous pad (152), such insect station is not capable of using either

Appeal No. 1999-2323
Application No. 08/434519

a granular bait or a paste bait. Accordingly, we will not sustain the examiner's rejections of claims 2 and 3 under 35 U.S.C. § 103(a).

The last rejection for our review is that of claims 4 through 7 under 35 U.S.C. § 103(a) as being unpatentable over Wefler in view of Demarest '229. In this instance, it is the examiner's position with regard to claim 4 that while Wefler shows a concave receptacle (see col. 4, line 65 - col. 5, line 5), it does not particularly disclose a concave receptacle having an inverted conical shape as required in appellants' claim 4. However, in the examiner's view, it would have been obvious to one of ordinary skill in the art to modify Wefler by making the concave receptacle therein of an inverted conical shape in view of the showing in Demarest '229 of a reservoir or receptacle (12) having an inverted conical shape, to thereby better concentrate the bait towards the center of the receptacle beneath the central opening (22) so that the bait can be easily accessed by the insects at the central opening. As for the particular ranges of "interior flooding angle" set forth in appellants' claims 5 through 7, the

Appeal No. 1999-2323
Application No. 08/434519

examiner considers that such ranges for the flooding angle would have been an obvious matter of design choice to one of ordinary skill in the art, since a receptacle whose walls are inclined at such angles would provide a receptacle which concentrates the bait at the center of the receptacle through the forces of gravity acting upon the bait within the receptacle.

In this instance, we are in agreement with the examiner. Based on the teachings in Wefler, in the paragraph bridging columns 4 and 5 thereof, and the showings in Demarest '229, we consider that it would have been obvious to one of ordinary skill in the art to provide the insect bait station of Wefler with a concave receptacle in the form of an inverted conical shape so as to achieve the end desired by Wefler, i.e., of having even minimal amounts of liquid bait (156) on the floor (118) drain toward the porous pad (158) and thereby be sufficient to contact the porous pad for transport upwardly toward the upper surface (154) thereof. As for the ranges of flooding angle set forth in claims 5 through 7 on appeal, we share the examiner's view that such ranges would have been an

Appeal No. 1999-2323
Application No. 08/434519

obvious matter of design choice for one of ordinary skill in the art, since such an artisan would have perceived the interior flooding angles to be result effective variables. In this regard, it is well settled that, as a general rule, the discovery of an optimum value or range of a result effective variable is well within the skill of the art. See In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). Thus, we consider that one having ordinary skill in the art would have found it obvious to have altered the angular relationship between the walls of the receptacle in Wefler to be in the claimed ranges of flooding angle so as to provide for optimum drainage of the liquid bait to the area around the porous pad (152) of the bait station. Such changes, in our view, would involve nothing more than routine experimentation and the application of common knowledge and common sense of the person of ordinary skill in the art. Thus, we sustain the examiner's rejection of claims 4 through 7 under 35 U.S.C. § 103(a).

To summarize, we have sustained both the examiner's rejection of claims 1 and 8 through 11 under 35 U.S.C. §

Appeal No. 1999-2323
Application No. 08/434519

102(e) based on Wefler, and the examiner's rejection of claims 4 through 7 under 35 U.S.C. § 103(a) based on Wefler and Demarest '229. However, we have not sustained the examiner's rejections of claims 2 and 3 under 35 U.S.C. § 103(a) based, respectively, on Wefler and Moore, and Wefler and Morris. Thus, the decision of the examiner is affirmed-in-part.

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

AFFIRMED-IN-PART

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
JOHN P. MCQUADE)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
JENNIFER D. BAHR)	
Administrative Patent Judge)	

CEF:lmb
HARRY A. PACINI

Appeal No. 1999-2323
Application No. 08/434519

THE CLOROX COMPANY
P.O. BOX 24305
OAKLAND, CA 94623-1305

CLAIM 1

1. An insect bait station comprising:

an upper annular surface, a central opening in the bottom of the annular surface, having a downwardly positioned continuous wall leading to a central axial recessed opening, an upwardly positioned continuous outer sidewall, a bottom surface peripherally affixed to the outer sidewall and an interior portion;

said downwardly positioned continuous wall leading from the upper annular surface to said interior portion of said station through said central axial recessed opening;

said downwardly positioned wall and said outer sidewall being coterminous with the upper annular surface;

said downwardly positioned continuous wall leading to said central opening in the bottom thereof in communication with the interior of the bait station; and

a bottom surface having a modified concave receptacle to hold bait.