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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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAILED

SEP 11 1995

Ex parte JOE J. ESTRADA

PAT.&T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Appeal No. 94-0336
Application 07/880,147¹

ON BRIEF

Before GOLDSTEIN, JOHN D. SMITH and ELLIS, Administrative Patent Judges.

JOHN D. SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 6.

¹ Application for patent filed May 6, 1992. According to applicant, this application is a continuation-in-part of Application 07/446,909, filed December 6, 1989.

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ppm to 500 ppm. The treated produce is then stored at a reduced temperature.

It is said to be surprising that the use of such a composition is capable of inhibiting microbial degradation and wilting without discoloring or degrading the leafy produce. In this regard, the concentration ranges of both the hypochlorite component and the salt component are critical because higher concentrations of these components cause discoloration as well as reducing the preservative capabilities of the treatment.

The examiner's obviousness conclusion is predicated principally on the disclosures of the Baylet publication, a reference which teaches a technique for decontaminating and disinfecting fresh produce carrying pathogenic bacteria by using a diluted aqueous solution composed of sodium hypochlorite and sodium chloride.

According to the examiner, with respect to the claimed relative proportions of the hypochlorite and salt components, Baylet "clearly teaches the claimed concentrations" (answer, p. 4), a finding based on Baylet's disclosure that the diluted solution contains a "stable chlorine concentration of 125 ppm". See the translation at page 5, line 4. However, as noted at page 3, lines 8 and 9 of the Baylet translation, it is the sodium hypochlorite component, not the salt (sodium chloride) component, that is expressed in terms of the weight of active chlorine.

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Accordingly, the examiner's factual finding regarding the relative proportions of the components of the diluted solution of Baylet is clearly erroneous.³ As correctly noted and argued by appellant, the diluted Baylet solution actually contains 125 ppm sodium hypochlorite and 2000 ppm sodium chloride which is substantially more concentrated with respect to both components than the composition utilized and claimed in appellant's process. Moreover, since Baylet is concerned with the general problem of treating decontaminated produce possibly carrying pathogenic bacteria, it is not readily apparent why a more diluted concentration would have been utilized by a person of ordinary skill in the art.

In the manner relied upon by the examiner, Schiro does not remedy the basic deficiencies of Baylet. Moreover, while Schiro teaches the use of treatment solutions containing sodium hypochlorite in a range which overlaps the claimed sodium hypochlorite range of appellant's diluted aqueous solution, there is no suggestion in Schiro of using a sodium or potassium chloride salt as required by the present invention. Based on the foregoing, we are constrained to reverse the examiner's rejection of

³ The salt/hypochlorite ratio of Baylet's solution is 16:1. Thus even if the examiner were correct in characterizing the salt concentration as 125 ppm, the calculated hypochlorite would be less than the range claimed (i.e., $125/16 \sim 8$ ppm).

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the appealed claims for obviousness since the relied upon refer-
ences failed to establish a prima facie case of obviousness.

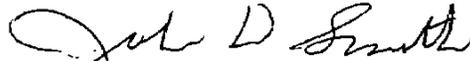
In view of our finding of a lack of a prima facie case
of obviousness, we find it unnecessary to evaluate the probative
weight of the relied upon evidence of nonobviousness of record
herein.

Based on the foregoing, the examiner's decision reject-
ing the appealed claims is reversed.

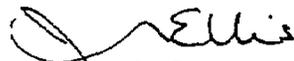
REVERSED



MELVIN GOLDSTEIN)
Administrative Patent Judge)



JOHN D. SMITH)
Administrative Patent Judge)



JOAN ELLIS)
Administrative Patent Judge)

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