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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/276,553	03/06/2006	Newton R. White	25040.1464	3345
29052	7590	10/01/2019	EXAMINER	
Eversheds Sutherland (US) LLP 999 PEACHTREE STREET, N.E. Suite 2300 ATLANTA, GA 30309			MOORE, WALTER A	
			ART UNIT	PAPER NUMBER
			1793	
			NOTIFICATION DATE	DELIVERY MODE
			10/01/2019	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte NEWTON R. WHITE,¹
KELLY H. SEPCIC, GREGG CARPENTER, LAWRENCE B.
ZIESEL, and ROBERT D. HUGHES IV

Appeal 2018-003432²
Application 11/276,553
Technology Center 1700

Before MARK NAGUMO, JAMES C. HOUSEL, and BRIAN D. RANGE,
Administrative Patent Judges.

NAGUMO, *Administrative Patent Judge.*

DECISION ON APPEAL

Newton R. White, Kelly H. Sepcic, Gregg Carpenter,
Lawrence B. Ziesel, and Robert D. Hughes IV (“Coca-Cola”) timely appeal
under 35 U.S.C. § 134(a) from the Final Rejection³ of all pending claims 1,

¹ The real party in interest is listed as The Coca-Cola Company (“Coca-Cola”). (Appeal Brief, filed 28 July 2017 (“Br.”), 2.)

² Coca-Cola waived appearance at the Hearing scheduled for 26 September 2019. (Communication filed 17 September 2019.)

³ Office Action mailed 9 March 2017 (“Final Rejection”; cited as “FR”).

4, 5, 10–21, 24–29, 45–47, and 49–59. We have jurisdiction. 35 U.S.C. § 6.
We affirm-in-part.

OPINION

A. Introduction⁴

The subject matter on appeal relates to methods for dispensing a beverage selected from a number of beverages, each comprising a food acid concentrate and a food acid-degradable concentrate, selected from plural concentrates of each kind.

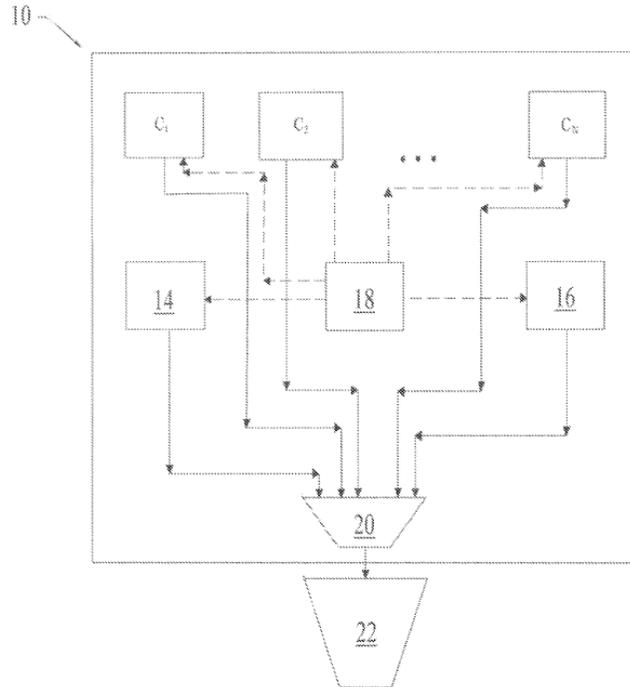
This is the second time rejected claims in this application have come before the Patent Trial and Appeal Board for review from a Final Rejection by the Primary Examiner. The first appeal⁵ was resolved on the meaning, as recited in the claims, of the limitation that a food acid concentrate is stored separately from a food acid-degradable composition, such that the food acid concentrate cannot degrade the food acid-degradable composition.

As will be seen, the present appeal is resolved on the meaning of the limitation, as recited in independent claims 1 and 21, “automatically dispensing continuously in a predetermined ratio” a food acid concentrate and a food acid-degradable concentrate.

⁴ Application 11/276,553, *Methods and apparatuses for making compositions comprising an acid and an acid degradable component and/or compositions comprising a plurality of selectable components*, filed 6 March 2006. We refer to the “553 Specification,” which we cite as “Spec.”

⁵ Appeal 2014-002605, entered 18 April 2016 (*aff’d*).

A general dispensing apparatus **10**⁶ is illustrated in Figure 1, below.



{Figure 1⁷ shows a diagram of beverage dispensing apparatus **10**}

The various components, including the food acid concentrate and the food acid-degradable concentrate, are stored separately in containers **C₁–C_s**. According to the beverage request entered at user interface **18**, the desired components are mixed with diluents (e.g., carbonated water) from diluent sources **14** and **16**, “at the dispensing nozzle **20** or anywhere downstream of the beverage component storage containers.” (Spec. 16, ll. 3–10.)

Of particular interest is the continuous pour mode, in which, the Specification explains, “as opposed to a conventional batch operation where a predetermined amount of ingredients are combined, the apparatus **10**

⁶ Throughout this Opinion, for clarity, labels to elements are presented in bold font, regardless of their presentation in the original document.

⁷ The original Figure is faint. We encourage all applicants to file high resolution, clear Figures for optimal exposition of the claimed invention.

provides for continuous mixing and flows in the correct ratio for a pour of any volume.” (*Id.* at 18, ll. 2–4.) According to the Specification, in the disclosed embodiments, “[t]his ability to dispense the appropriate ingredients in the appropriate proportions for a given flow rate results from the use of individual pumps and/or metering devices for each of the non-sweetener beverage component concentrates and the diluents.” (*Id.* at ll. 6–9.)

Claim 1 is representative and reads:

Method for making a selected post-mix beverage from a plurality of selectable post-mix beverages comprising,

storing a plurality of food acid concentrates in a plurality of respective acid storage containers;

storing a plurality of food acid-degradable concentrates in a respective plurality of component storage containers, wherein the food acid concentrates and the food acid-degradable concentrates are stored separately from each other;

receiving a request for the selected post-mix beverage; and

in response to the selection of the post-mix beverage,

automatically dispensing continuously in a predetermined ratio

one of the plurality of the food acid concentrates from a respective one of the plurality of food acid storage containers and

one of the plurality of food acid-degradable concentrates from a respective one of the plurality of component storage containers

such that the one of the plurality of the food acid concentrates and the one of the plurality of food acid-degradable concentrates mix together to form the selected post-mix beverage.

(Claims App., Br. 18; some formatting and emphasis added.)

Claims 4, 5, 10–20, 45–47, and 49–52 depend from claim 1.
(*Id.* at 18–21, 24, and 25.)

Remaining independent claim 21 is similar to claim 1, but requires storing at least three non-sweetener post-mix beverage component concentrates, at least one of which is a food acid concentrate, and at least one of which is a food acid-decomposable concentrate. (*Id.* at 22.)

Remaining claims 24–29 and 53–59 depend from claim 21. (*Id.* at 22–24, 26, and 27.)

The Examiner maintains the following grounds of rejection^{8, 9}:

- A. Claims 1, 4, 5, 10–21, 24–29, 45–47, 49–51, and 53–59 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher¹⁰ and Kunz.¹¹
- A1. Claims 15–20 and 26–28 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher, Kunz, and Boston.¹²
- A2. Claim 52 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher, Kunz, and Henley.¹³

⁸ Examiner’s Answer mailed 14 December 2017 (“Ans.”).

⁹ Because this application was filed before 16 March 2013, the effective date of the America Invents Act, we refer to the pre-AIA version of the statute.

¹⁰ Russel E. Fisher, *System for Dispensing Flavored Beverages*, U.S. Patent No. 2,880,912 (1959).

¹¹ Ludwig Kunz, *Method of Preparing Fruit Syrups*, U.S. Patent No. 1,735,118 (1929).

¹² Ronald P. Boston, *Process for Producing Carbonated Beverages*, U.S. Patent No. U.S. Patent No. 4,695,468 (1987).

¹³ Terry L. Henley et al., *Fluid Dispensing Apparatus*, U.S. Patent No. 3,827,467 (1974).

- B. Claims 21, 24–29, and 55–59 stand rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Forsythe,¹⁴ Fisher, and Davis.¹⁵
- B1. Claim 28 stands rejected under 35 U.S.C. § 103(a) in view of the combined teachings of Forsythe, Fisher, Davis, and Boston.

B. Discussion

The Board’s findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

Rejections A, A1, and A2 based on Fisher

Coca-Cola urges the Examiner errs harmfully in finding that Fisher discloses continuously dispensing concentrates. Rather, in Coca-Cola’s view, supported by a Declaration¹⁶ by Gregg Carpenter, one of the named inventors, Fisher describes a conventional batch pour dispenser. Coca-Cola argues that Fisher dispenses predetermined amounts of stored ingredients rather than predetermined ratios. (Br. 7–8.) Coca-Cola directs our attention to timing rotor **42**, which is fitted with cams **46**, **48**, and **50**, as shown in Fisher Figure 2, reproduced on the next page. Cams **46**, **48**, and **50** provide

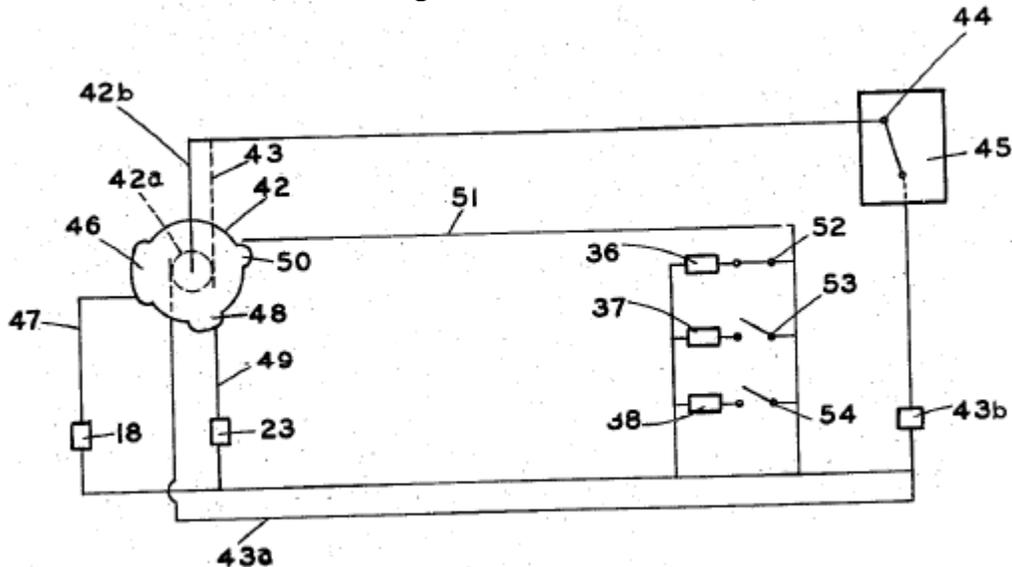
¹⁴ David P. Forsythe, *Beverage Dispensing Apparatus*, U.S. Patent No. 5,960,997 (1999).

¹⁵ Charles W. Davis, Jr., et al., *Method for Increasing Stability of Liquid Beverage Concentrate*, U.S. Patent No. 4,830,870 (1989).

¹⁶ Declaration of Gregg Carpenter, dated 13 December 2016, filed following the Final Rejection communicated 26 September 2016. The Examiner denied entry of the declaration (Advisory Action communicated on 11 January 2017), and Coca-Cola filed a Request for Continued Examination under 37 C.F.R. § 1.114, including the Declaration. The Final Rejection on appeal ensued.

carbonated water via valve **18**, sweetener via valve **23**, and flavoring via valve **36**, respectively (*see* Fisher Figure 1, not reproduced here), for different periods of time set by the circumferential length of each cam.

{Fisher Figure 2 is shown below}



{Fisher Figure 2 shows a timing circuit with timing rotor **42** with cams **46**, **48**, and **50**, which open, respectively, valves **18**, **23**, and **36**, respectively, for durations proportional to the circumferential length of each cam}

The Examiner maintains that “[t]he fact that batch pour and continuous dispensers are different is not a basis for patentability of the presently claimed invention.” (Ans. 22, last full para.) The Examiner maintains further that “the argument is not commensurate in scope with the claimed invention” and that “[t]he claims do not establish a ‘continuous pour’ dispenser or a ‘batch pour’ dispenser.” (*Id.*)

Although we concur in the Examiner’s apparent assessment that the claims are broad and that the Specification does not define the term “automatically dispensing continuously in a predetermined ratio” with ideal precision, we are unable to find adequate support for the Examiner’s conclusion that the term is so broad as to include batch dispensing as

described by Fisher. The Specification states that “the apparatus **10** provides for continuous mixing and flows in the correct ratio for a pour of any volume.” (*Id.* at 18, ll. 3–4.) The Examiner’s “three different ways” that “automatically dispensing continuously” are satisfied by Fisher, namely substituting the overlapping dispensing of two ingredients at a time for the simultaneous dispensing of all ingredients, continuously, at the same time (Ans. 24), are strained at best. Claims are indeed to be read broadly during examination, but they must be read “in light of the Specification”—and the Examiner has not shown that the Specification would have suggested to persons having ordinary skill in the art as broad a reading as the Examiner proposes.

The Examiner makes no findings regarding any of the additional references or the further limitations of the dependent claims that cure these defects.

We therefore reverse Rejections A, A1, and A2 based on Fisher.

Rejections B and B1 based on Forsythe

Coca-Cola, following Carpenter’s testimony that Forsythe also discloses a conventional batch dispenser because “[t]he batch pour is again time based” (Declaration 2, § 5), urges that the Examiner errs harmfully in determining that independent claim 21 and its dependent claims would have been obvious for lack of disclosure of the limitation, “automatically dispensing continuously in a predetermined ratio.” (Br. 12–13, Reply 11.)

Coca-Cola’s arguments in this regard are not persuasive because Forsythe discloses that the disclosed apparatus “allows the flavoring to be dispensed into the cup **25** *simultaneously and throughout dispensing of the*

base beverage.” (Forsythe, col. 7, ll. 35–38 (emphasis added).) According to Forsythe, “[t]his results in a more uniform, thorough mixing of the flavor with the base beverage to provide a fresher, more consistent taste during consumption of the beverage.” (*Id.* at ll. 39–41.) Forsythe emphasizes that “because the flavoring dispensing system control **65** is responsive only to the beverage control signal, *a constant volume ratio of flavoring to base beverage is automatically maintained by the apparatus regardless of the size of the cup being filled.*” (Forsythe, col. 7, ll. 41–46 (emphasis added).) Coca-Cola does not address these disclosures, mentioned specifically by the Examiner (FR 4), which appear to meet the principal disputed limitation of automatic continuous dispensing. It is not clear what aspect of this limitation Coca-Cola maintains is not met by Forsythe.

As for the purported absence of disclosure of at least three initially separated components (Br. 13–14), as the Examiner finds (FR 4), Forsythe indicates that “other flavorings may be included in the flavoring dispensing system and dispensed in a similar manner.” (Forsythe, col. 3, ll. 36–38.¹⁷) Similarly, the Examiner (FR 4–5) finds that Davis teaches maintaining “citrus-flavored oil . . . in a relatively low-acid environment prior to beverage preparation results in a much improved flavor oil stability” (Davis, col. 2, ll. 20–23). In Davis’s words, “[i]n a second aqueous component is placed a majority of the acid which is desired for the final beverage product.” (*Id.* at ll. 29–31.) We are therefore not persuaded of harmful error

¹⁷ See also Forsythe, col. 3, ll. 28–30, “[t]he number of flavoring lines **51** may vary depending on the number of flavorings that may be added to a particular base beverage.”)

on this record in the Examiner's findings that separated acid and acid-degradable components would have been obvious, as required by claim 21.

Coca-Cola's remaining arguments regarding the rejection of claim 28 (Br. 14–15) and of claim 52 (*id.* at 15–16) are cumulative as they argue that Boston and Henley do not cure the defects of Forsythe. Not having been persuaded of harmful error in the Examiner's findings regarding Forsythe, we do not find these further arguments persuasive of harmful error.

We affirm Rejections B, B1, and B2 of claim 21 and the associated dependent claims.

C. Order

It is ORDERED that the rejection of claims 1, 4, 5, 10–21, 24–29, 45–47, 49–51, and 53–59 under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher and Kunz is REVERSED.

It is FURTHER ORDERED that the rejection of claims 15–20 and 26–28 under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher, Kunz, and Boston is REVERSED

It is FURTHER ORDERED that the rejection of claims 52 under 35 U.S.C. § 103(a) in view of the combined teachings of Fisher, Kunz, and Henley is REVERSED.

It is FURTHER ORDERED that the rejection of claims 21, 24–29, and 55–59 under 35 U.S.C. § 103(a) in view of the combined teachings of Forsythe, Fisher, and Davis is AFFIRMED.

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It is FURTHER ORDERED that the rejection of claim 28 under 35 U.S.C. § 103(a) in view of the combined teachings of Forsythe, Fisher, and Boston is AFFIRMED.

In summary:

Rejections A, A1, and A2 of claims 1, 4, 5, 10–20, 45–47, and 49–52 are REVERSED;

Rejections B and B1 of claims 21, 24–29, and 53–59 are AFFIRMED.

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

AFFIRMED-IN-PART