RESPONSE TO FINAL OFFICE ACTION DATED NOVEMBER 9, 2009

Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Sir:

This paper is submitted in response to the final Office Action dated November 9, 2009, for which the three-month date for response is February 9, 2010. This response being filed within two months of the filing date of the “final” Office Action (or on the first business day after two months, if the two months end on a weekend or a Federal holiday), Applicants are entitled to an Advisory Action. M.P.E.P. §706.07(f) I (C).

Listing of the Claims begins on page 3 of this paper.

Remarks/Arguments begin on page 14 of this paper.
It is believed that no fee is due; however, should any fees under 37 C.F.R. §§ 1.16 to 1.21 be required for any reason relating to this document, the Director is authorized to deduct said fees from Williams, Morgan & Amerson, P.C. Deposit Account No. 50-0786/2027.002700RE.

Reconsideration of the application in view of the following remarks is respectfully requested.
Claim 1.  (Previously presented) A food product that comprises an oligosaccharide composition that is digestion resistant or slowly digestible and that is made by a process selected from:
(a) a process comprising:
producing an aqueous composition that comprises at least one oligosaccharide and at least one monosaccharide by saccharification of starch;
fractionating the aqueous composition by a method comprising at least one of membrane filtering and sequential simulated moving bed chromatography to form a monosaccharide-rich stream and a digestion resistant oligosaccharide-rich stream; and
recovering the oligosaccharide-rich stream; and
(b) a process comprising:
heating an aqueous feed composition that comprises at least one monosaccharide or linear saccharide oligomer, and that has a solids concentration of at least about 70% by weight, to a temperature of at least about 40°C; and contacting the feed composition with at least one catalyst that accelerates the rate of cleavage or formation of glucosyl bonds for a time sufficient to cause formation of non-linear saccharide oligomers,
wherein the oligosaccharide composition contains a higher concentration of non-linear saccharide oligomers than linear saccharide oligomers, and comprises non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration of at least about 20% by weight on a dry solids basis.

Claim 2.  (Original) The food product of claim 1, wherein the food product is selected from baked foods, breakfast cereal, dairy products, confections, jams and jellies, beverages, fillings, extruded and sheeted snacks, gelatin desserts, snack bars, cheese and cheese sauces, edible and water-soluble films, soups, syrups, sauces, dressings, creamers,
icings, frostings, glazes, pet food, tortillas, meat and fish, dried fruit, infant and toddler
food, and batters and breading.

Claim 3. (Original) The food product of claim 2, wherein the oligosaccharide
composition is present in the food product as a complete or partial replacement for
sweetener solids.

Claim 4. (Original) The food product of claim 2, wherein the oligosaccharide
composition is present in the food product as a source of dietary fiber.

Claim 5. (Original) The food product of claim 2, wherein the oligosaccharide
composition is present in the food product to reduce caloric density.

Claim 6. (Original) The food product of claim 2 wherein the oligosaccharide
composition is present in the food product as a bulking agent, to reduce water activity, to
manage water, or to increase humectancy or perceived moistness.

Claim 7. (Original) The food product of claim 2 wherein the oligosaccharide
composition is used to reduce the fat content of the food product.

Claim 8. (Original) The food product of claim 1, wherein the oligosaccharide
composition is made using process (a) and the aqueous composition comprises dextrose,
fructose, and a mixture of oligosaccharides.

Claim 9. (Original) The food product of claim 1, wherein the oligosaccharide
composition is made using process (a) and the oligosaccharide-rich stream comprises at
least about 50% by weight oligosaccharides on a dry solids basis, and wherein the
oligosaccharides are primarily digestion resistant or slowly digestible.
Claim 10. (Original) The food product of claim 9, wherein the oligosaccharide-rich stream comprises at least about 90% by weight oligosaccharides on a dry solids basis, and wherein the oligosaccharides are primarily digestion resistant or slowly digestible.

Claim 11. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (a) and the fractionation comprises nanofiltration.

Claim 12. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (a) and the fractionation is performed by sequential simulated moving bed chromatography (SSMB).

Claim 13. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (a) and the oligosaccharide-rich stream comprises a minor amount of dextrose and fructose, and wherein the process further comprises contacting the oligosaccharide-rich stream with an isomerization enzyme such that at least some of the dextrose is converted to fructose, thereby producing an isomerized oligosaccharide-rich stream.

Claim 14. (Original) The food product of claim 1, the oligosaccharide composition is made using process (a), and wherein the process further comprises membrane filtering the oligosaccharide-rich stream to produce a second monosaccharide-rich stream and a second oligosaccharide-rich stream.

Claim 15. (Original) The food product of claim 14, wherein the second oligosaccharide-rich stream comprises more than about 90% by weight oligosaccharides on a dry solids basis.

Claim 16. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (a) and the oligosaccharide-rich stream comprises a minor amount of monosaccharides, and wherein the process further comprises
hydrogenating the oligosaccharide-rich stream to convert at least some of the monosaccharides therein to alcohols, thereby producing a hydrogenated oligosaccharide-rich stream.

Claim 17. (Previously presented) The food product of claim 14, wherein the second oligosaccharide-rich stream comprises a minor amount of monosaccharides, and wherein the process further comprises hydrogenating the second oligosaccharide-rich stream to convert at least some of the monosaccharides therein to alcohols, thereby producing a hydrogenated oligosaccharide-rich stream.

Claim 18. (Original) The food product of claim 1, the oligosaccharide composition is made using process (a), and wherein the process further comprises contacting the oligosaccharide-rich stream with a glucosidase enzyme such that at least some of any residual monosaccharides present in the stream are covalently bonded to oligosaccharides or other monosaccharides.

Claim 19. (Original) The food product of claim 1, the oligosaccharide composition is made using process (a), and wherein the process further comprises reducing the color of the oligosaccharide-rich stream by contacting it with activated carbon.

Claim 20. (Original) The food product of claim 1, the oligosaccharide composition is made using process (a), and wherein the fractionation comprises nanofiltration, the aqueous composition comprises dextrose, fructose, and a mixture of oligosaccharides, and the oligosaccharide-rich stream comprises a minor amount of dextrose and fructose, and wherein the process further comprises at least one of the following: contacting the oligosaccharide-rich stream with an isomerization enzyme such that at least some of the dextrose is converted to fructose; membrane filtering the digestion resistant oligosaccharide-rich stream; hydrogenating the oligosaccharide-rich stream to convert at least some of the monosaccharides therein to alcohols;
contacting the oligosaccharide-rich stream with a glucosidase enzyme to create a reversion product such that at least some of any residual monosaccharides present in the stream are covalently bonded to oligosaccharides or other monosaccharides; and reducing the color of the oligosaccharide-rich stream by contacting it with activated carbon; wherein the oligosaccharide-rich stream is slowly digestible by the human digestive system.

Claim 21. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the aqueous feed composition comprises at least one monosaccharide and at least one linear saccharide oligomer.

Claim 22. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the aqueous feed composition is a dextrose syrup, a corn syrup, or a solution of maltodextrin.

Claim 23. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and at least about 50% by weight on a dry solids basis of the product composition is slowly digestible.

Claim 24. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and at least about 50% by weight on a dry solids basis of the product composition is digestion resistant.

Claim 25. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the feed composition is contacted with the at least one catalyst for at least about five hours.
Claim 26. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the feed composition is contacted with the at least one catalyst for about 15-100 hours.

Claim 27. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the at least one catalyst is an enzyme that accelerates the rate of cleavage or formation of glucosyl bonds.

Claim 28. (Original) The food product of claim 27, wherein the enzyme accelerates the rate of cleavage of alpha 1-2, 1-3, 1-4, or 1-6 glucosyl bonds to form dextrose residues.

Claim 29. (Original) The food product of claim 27, wherein the enzyme is a glucoamylase enzyme composition.

Claim 30. (Original) The food product of claim 27, wherein the amount of enzyme is about 0.5 – 2.5% by volume of the feed composition.

Claim 31. (Original) The food product of claim 27, wherein the feed composition is maintained at about 55 - 75°C during the contacting with the enzyme.

Claim 32. (Original) The food product of claim 31, wherein the feed composition is maintained at about 60 - 65°C during the contacting with the enzyme.

Claim 33. (Original) The food product of claim 27, wherein the feed composition is contacted with the enzyme for about 20-100 hours prior to inactivation of the enzyme.

Claim 34. (Original) The food product of claim 33, wherein the feed composition is contacted with the enzyme for about 50-100 hours prior to inactivation of the enzyme.
Claim 35. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the at least one catalyst is an acid.

Claim 36. (Original) The food product of claim 35, wherein the acid is hydrochloric acid, sulfuric acid, phosphoric acid, or a combination thereof.

Claim 37. (Original) The food product of claim 35, wherein acid is added to the feed composition in an amount sufficient to make the pH of the feed composition no greater than about 4.

Claim 38. (Original) The food product of claim 35, wherein acid is added to the feed composition in an amount sufficient to make the pH of the feed composition about 1.0 – 2.5.

Claim 39. (Original) The food product of claim 35, wherein the feed composition has a solids concentration of about 70 – 90% and is maintained at a temperature of about 70 - 90°C during the contacting with the acid.

Claim 40. (Original) The food product of claim 35, wherein the solids concentration of the feed composition is at least about 80% by weight, the acid is added to the feed composition in an amount sufficient to make the pH of the composition about 1.8, and the feed composition is maintained at a temperature of at least about 80°C for about 4-24 hours after it is contacted with the acid.

Claim 41. (Original) The food product of claim 35, wherein the solids concentration of the feed composition is about 90-100% by weight, and the feed composition is maintained at a temperature of at least about 149°C for about 0.1 – 15 minutes after it is contacted with the acid.

Claim 42. (Original) The food product of claim 41, wherein the acid comprises a combination of phosphoric and hydrochloric acid.
Claim 43. (Original) The food product of claim 1, the oligosaccharide composition is made using process (b), and wherein the process further comprises hydrogenating the product composition.

Claim 44. (Original) The food product of claim 43, wherein the hydrogenating decolorizes the product composition but does not substantially change its dextrose equivalence.

Claim 45. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the feed composition comprises at least about 75% solids by weight.

Claim 46. (Original) The food product of claim 45, wherein the feed composition comprises about 75 - 90% solids by weight.

Claim 47. (Previously presented) The food product of claim 1, wherein the oligosaccharide composition is made using process (b).

Claim 48. (Original) The food product of claim 47, wherein the product composition comprises non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration of at least about 25% by weight on a dry solids basis.

Claim 49. (Original) The food product of claim 48, wherein the product composition comprises non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration of at least about 30% by weight on a dry solids basis.

Claim 50. (Original) The food product of claim 49, wherein the product composition comprises non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration of at least about 50% by weight on a dry solids basis.
Claim 51. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the concentration of non-linear saccharide oligomers in the product composition is at least twice as high as the concentration of linear saccharide oligomers.

Claim 52. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the product composition comprises a minor amount of residual monosaccharides, and wherein the process further comprises removing at least some residual monosaccharides from the product composition by membrane filtration, chromatographic fractionation, or digestion via fermentation.

Claim 53. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the at least one catalyst that accelerates the rate of cleavage or formation of glucosyl bonds is enzyme, and the product composition is subsequently contacted with an acid that accelerates the rate of cleavage or formation of glucosyl bonds.

Claim 54. (Original) The food product of claim 1, wherein the oligosaccharide composition is made using process (b) and the at least one catalyst that accelerates the rate of cleavage or formation of glucosyl bonds is acid, and the product composition is subsequently contacted with an enzyme that accelerates the rate of cleavage or formation of glucosyl bonds.

Claim 55. (Original) The food product of claim 1, the oligosaccharide composition is made using process (b), and further comprising hydrolyzing a maltodextrin to form a hydrolyzed saccharide solution and concentrating the hydrolyzed saccharide solution to at least about 70% dry solids to form the feed composition.

Claim 56. (Original) The food product of claim 55, wherein the concentrating and the contacting of the feed composition with the at least one catalyst occur simultaneously.
Claim 57. (Original) The food product of claim 55, wherein the concentrating occurs prior to the contacting of the feed composition with the at least one catalyst.

Claim 58. (Original) A food product comprising a carbohydrate composition that is primarily slowly digestible or digestion resistant, wherein the carbohydrate composition comprises a major amount on a dry solids basis of linear and non-linear saccharide oligomers, and wherein the concentration of non-linear saccharide oligomers is greater than the concentration of linear saccharide oligomers.

Claim 59. (Original) The food product of claim 58, wherein the concentration of non-linear saccharide oligomers in the composition is at least twice as high as the concentration of linear saccharide oligomers.

Claim 60. (Original) The food product of claim 58, wherein the concentration of non-linear saccharide oligomers having a degree of polymerization of at least three is at least about 20% by weight on a dry solids basis.

Claim 61. (Original) The food product of claim 60, wherein the concentration of non-linear saccharide oligomers having a degree of polymerization of at least three is at least about 25% by weight on a dry solids basis.

Claim 62. (Original) The food product of claim 61, wherein the concentration of non-linear saccharide oligomers having a degree of polymerization of at least three is at least about 30% by weight on a dry solids basis.

Claim 63. (Original) The food product of claim 62, wherein the concentration of non-linear saccharide oligomers having a degree of polymerization of at least three is at least about 50% by weight on a dry solids basis.
Claim 64. (Original) The food product of claim 58, wherein the concentration of non-linear saccharide oligomers is at least about 90% by weight on a dry solids basis, and the concentration of isomaltose is at least about 70% by weight on a dry solids basis.

Claim 65. (Original) The food product of claim 2, wherein the oligosaccharide composition is present in the food product as an adhesive or for surface appearance.

Claim 66. (Original) The food product of claim 2, wherein the oligosaccharide composition is present in the food product to extend the shelf life of the food product.
REMARKS

1. Status of claims

After entry of the above amendment, claims 1-66 are pending and under consideration.

2. Claim rejections under 35 U.S.C. § 103(a)


Claims 1-66, as amended, contain limitations unknown over Bengs, Dreese, Gossart, and Mandai. Therefore, no apparent reason to combine Bengs, Dreese, Gossart, and Mandai can exist, let alone with any reasonable expectation of success. Because an apparent reason to combine references is a requirement of a prima facie case of obviousness under the Supreme Court's KSR ruling, claims 1-66 are patentable under 35 U.S.C. § 103(a) over Bengs, Dreese, Gossart, and Mandai. The reasons for this conclusion are set forth below.

The present claims are directed to food products comprising oligosaccharide compositions containing a higher concentration of non-linear saccharide oligomers than linear saccharide oligomers, and comprising non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration of at least about 20% by weight on a dry solids basis. The claims further recite process steps, but as is well known, the patentability of product-by-process claims is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or
obvious from a product of the prior art, the claim is unpatentable. MPEP 2113, quoting *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985).

As should be clear from the plain text of the claims, the higher concentration of non-linear saccharide oligomers than linear saccharide oligomers and the non-linear saccharide oligomers having a degree of polymerization of at least three being present in a concentration of at least about 20% by weight on a dry solids basis are properties of the *oligosaccharide composition*, not the recited process steps.

The two properties of the oligosaccharide composition are each an unknown option or element in view of the references.

Specifically, Bengs discloses poly-(1,4-α-D-glucan) having a degree of branching in the 6 position of at most 0.5%, and in the 2 and/or 3 position of, in each case, at most 1.0%. Col. 2, lines 61-67. The person of ordinary skill in the art would understand Bengs' polyglucans to thus have a lower concentration of non-linear saccharide oligomers than linear saccharide oligomers, and also to comprise non-linear saccharide oligomers having a degree of polymerization of at least three in a concentration much less than about 20% by weight on a dry solids basis.

Dreese discloses food additives based on starch hydrolysates. (e.g., col. 4, lines 7-68). Dreese is silent regarding the concentrations of non-linear saccharide oligomers and linear saccharide oligomers in its starch hydrolysates.

Gossart discloses food additives including oligosaccharides (col. 2, line 40). Gossart is silent regarding the concentrations of non-linear saccharide oligomers and linear saccharide oligomers in its oligosaccharides.

Mandai discloses non-reducing oligosaccharides comprising a trehalose structure (Abstract, col. 1, line 54 to col. 2, line 9). Mandai is silent regarding the concentrations of non-
linear saccharide oligomers and linear saccharide oligomers in its non-reducing oligosaccharides. Mandai specifies its non-reducing oligosaccharides have the characteristic "assimilability into energy on oral intake" (ibid.). The person of ordinary skill in the art would understand "assimilability into energy on oral intake" to mean Mandai's non-reducing oligosaccharides are susceptible to digestion. In contrast, the present specification makes clear that an oligosaccharide composition according to the present claims is resistant to digestion. E.g., page 4, lines 9-28.

In view of the teachings of the above references, a higher concentration of non-linear saccharide oligomers than linear saccharide oligomers is an unknown option or element of oligosaccharide compositions. Also in view of the teachings of the above references, non-linear saccharide oligomers having a degree of polymerization of at least three being present in a concentration of at least about 20% by weight on a dry solids basis is another unknown option or element of oligosaccharide compositions. As should be clear, Bengs and Mandai teach compositions that would not have either of these options or elements; Dreese and Gossart fail to teach compositions that have either of these options or elements.

The references further fail to suggest these unknown options or elements. Bengs is aimed toward linear polyglucans, which would suggest to the person of ordinary skill in the art that non-linear saccharide oligomers are undesirable or ineffective. Mandai teaches that its oligosaccharides are assimilable into energy on oral intake, which suggests to the person of ordinary skill in the art that digestion resistant oligosaccharides, such as those presently claimed, are undesirable or ineffective. Dreese and Gossart give so little information that they suggest nothing to the person of ordinary skill in the art.
To summarize, the prior art references fail to teach or suggest all the claim limitations, and thus, claims 1-66, as amended, are patentable under 35 U.S.C. § 103(a) over Bengs, Dreese, Gossart, and Mandai. The Examiner’s attention is directed to In re Royka, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974). This authority clearly states that, to establish a prima facie case of obviousness, the prior art reference (or references when combined) must teach or suggest all the claim limitations. For the reasons set forth above, they do not. The rejection is improper for this reason alone.

Further, even if the Examiner is minded to disregard the precedent of In re Royka, the Supreme Court's KSR decision does not stand for the proposition that unknown options or elements can be the basis for a rejection under 35 U.S.C. § 103(a). To quote (emphases added):

The principles underlying [Sakraida and Anderson's-Black Rock] are instructive when the question is whether a patent claiming the combination of elements of prior art is obvious. When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. Sakraida and Anderson's-Black Rock are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

Following these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement. Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit. See In re Kahn, 441 F. 3d 977, 988 (CA Fed. 2006) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness").
Clearly, the Supreme Court's decision in *KSR* does *not* stand for the proposition that *unknown* options or elements can be the basis for a rejection under 35 U.S.C. § 103(a).

Because these limitations of the present claims are unknown options or elements in view of the cited references, no apparent reason to combine the cited references exists, let alone with any reasonable expectation of success. Thus, claims 1-66, as amended, are patentable under 35 U.S.C. § 103(a) over Bengs, Dreese, Gossart, and Mandai under the requirements of the Supreme Court's holding in *KSR*.

Thus, claims 1-66, as amended, contain limitations unknown over Bengs, Dreese, Gossart, and Mandai. As a result, no apparent reason to combine Bengs, Dreese, Gossart, and Mandai can exist, let alone with any reasonable expectation of success. Therefore, claims 1-66 are patentable under 35 U.S.C. § 103(a) over Bengs, Dreese, Gossart, and Mandai.

The Examiner made a number of statements that appear to reflect either a misunderstanding of the present invention or a misreading of the present claims and/or the cited references.

For example, at p. 2 of the Detailed Action, the Examiner stated "The claims differ [from the references] as to the method of oligosaccharide preparation." Although the claims do differ in this way, the Examiner's statement is inaccurate because the claims also differ because they contain options or elements, for specific example, a higher concentration of non-linear saccharide oligomers than linear saccharide oligomers, and non-linear saccharide oligomers having a degree of polymerization of at least three being present in a concentration of at least about 20% by weight on a dry solids basis, unknown over the references. The Examiner did not even attempt to point out where either of these options or elements may allegedly be found in the
references; her characterization of the references at p. 2 of the Detailed Action is utterly silent about both of the options or elements referred to above.

At p. 3 of the Detailed Action, the Examiner argued that, "Once the art has recognized the use of oligosaccharides in the production of food products the use and manipulation of oligosaccharides in food products is no more than conventional and well-within the skill of the art. Applicant is using known components to obtain no more than expected results." This argument is clearly incorrect in light of Applicants' comments above. The claims are not drawn to the use of oligosaccharides, i.e., they are not method of use claims. The claims are drawn to compositions (specifically, food products) containing an oligosaccharide composition having two properties that are unknown options or elements over any oligosaccharides disclosed by the cited references. The oligosaccharide compositions of the present claims are unknown over the cited references. Therefore, the compositions as a whole contain unknown options or elements over the cited references and are patentable under 35 U.S.C. § 103(a) over the cited references.

Related to this point, and also at p. 3 of the Detailed Action, the Examiner argued that "it would have been obvious… to use the specifically claimed oligosaccharides in any of [the cited references] because the use of oligosaccharides in food products is conventional in the art." Again, the present claims are not directed to methods of use, but to compositions, and those compositions contain options or elements unknown over the references. Therefore, the compositions are patentable under 35 U.S.C. § 103(a) over the cited references.

Finally, at p. 4 of the Detailed Action, the Examiner stated "In the absence of a showing to the contrary, the concentration of linear to non-linear saccharide oligomers would be no more than obvious to that of the prior art as the same components are used." This statement contains multiple errors. First, it is not the case that the same components are used between the cited
references and the present claims. As amply discussed above, an oligosaccharide composition having the properties recited by the present claims is unknown over the cited references.

If the Examiner is arguing that a composition taught by the cited references could be used as a feedstock for process (a) or process (b), as claimed, and such use would inherently lead to an oligosaccharide composition, as claimed, her argument fails for either of at least two reasons: first, there must be an apparent reason for the person of ordinary skill in the art to modify a composition taught by the cited references in this way. The apparent reason cannot come from the present specification—doing so would be an improper use of hindsight—but it does not come from the cited references. Second, something inherent is unknown, and "obviousness cannot be predicated on what is unknown." In re Newell, 13 U.S.P.Q.2d (BNA) 1248, 1250 (Fed Cir. 1989), quoting In re Spormann, 150 U.S.P.Q. (BNA) 449, 452 (C.C.P.A. 1966); In re Rijckaert, 28 U.S.P.Q.2d (BNA) 1955, 1957 (Fed. Cir. 1993), also quoting Spormann, at 452. "Such a retrospective view of inherency is not a substitute for some teaching or suggestion supporting an obviousness rejection." Rijckaert, at 1957.

For yet another error, the statement that the concentration "would be no more than obvious" fails to establish a prima facie case of obviousness. The prior art must disclose each and every element of the claimed invention and any motivation to combine or modify the prior art must be based upon a suggestion in the prior art. In re Lee, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. Id. at 1434-35. The Supreme Court's decision in KSR has not changed this requirement. See, for example, the quoted passage above. The Court in KSR approvingly quoted In re Kahn, 441 F. 3d 977, 988 (CA Fed. 2006) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be
some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness"). Further, the Court in KSR pointed to specific, concrete pieces of evidence, such as the interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, as being appropriate to determine whether there was an apparent reason to combine known elements in a claimed fashion.

Of course, the Court’s reasoning in KSR applies only to whether there was an apparent reason to combine known elements, which is not the situation here, where the claims contain unknown options or elements.

Finally, even if Applicants do not explicitly dispute in this paper a statement made by the Examiner, Applicants do not therefore acquiesce in any of the Examiner’s statements. Applicants submit the claims are allowable for at least the reasons set forth above.
3. Conclusion

Applicants submit all pending claims are in condition for allowance. The Examiner is invited to contact the undersigned patent agent at (713) 934-4065 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,

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### Payment information:

- Submitted with Payment: no

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**Warnings:**

**Information:**

Total Files Size (in bytes): 143526

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If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

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If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.

**New International Application Filed with the USPTO as a Receiving Office**

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