UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIMFROST AS
Petitioner,

v.

AKER BIOMARINE ANTARCTIC AS
Patent Owner.

Case IPR2020-01532

U.S Patent No. 9,644,169

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

Mail Stop Patent Board
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

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Patent Owner Aker Biomarine Antarctic AS ("Aker") requests review by the Director of the Board's finding in its Final Written Decision (Paper 33 ("FWD")) that claims 1-20 (collectively, the "challenged claims") of U.S. Patent No. 9,664,169 (the " '169 patent") are unpatentable. (FWD, 35).

I. Statement of Relief Requested

In the FWD, the Board held the challenged claims were unpatentable as obvious, concluding:

> In consideration of the above, we find that Petitioner demonstrates by a preponderance of the evidence that claims 1-5, 7-15, and 17-20 are unpatentable as obvious over the combined teachings of **Breivik II**, Catchpole, Budziński, Fricke, and Randolph, and that claims 6 and 16 are unpatentable as obvious over the combined teachings of **Breivik II**, Catchpole, Budziński, Fricke, Randolph, and Sampalis I.

(Emphasis added) FWD, 34. However, as stated by the Board in Footnote 16: "As noted above, we have considered Petitioner's grounds without relying on Breivik II." FWD, 35. Thus, the Board actually found the claims obvious over a sub-combination (*i.e.*, Catchpole, Budziński, Fricke, and Randolph for Ground 1 and Catchpole, Budziński, Fricke, Randolph, and Sampalis I for Ground 2) of the combination of references identified in the Petition and Instituted Grounds. In doing so, the Board specifically avoided addressing Aker's evidence that Breivik II is not prior art due to earlier invention. Aker respectfully submits that the Board erred by basing its decision on Grounds not including Breivik II, when both of the

Instituted Grounds specifically combined and relied on Breivik II. As a result, Aker contends that Petitioner did not meets its burden of establishing obviousness because Breivik II is not prior art, rendering both Instituted Grounds insufficient.

Aker respectfully requests that the FWD be vacated with respect to unpatentability of the challenged claims and the case remanded to the Board for a determination of whether Breivik II is prior art and decision on whether the challenged claims are patentable over the actual requested and Instituted Grounds that include Breivik II as the lead reference.

II. Summary of the Proceedings

The '169 Patent contains claims to methods of extracting krill oil with specific properties from a denatured krill material that has been stored from 1 to 24 months. FWD, 6.

The Petition (Paper 2, "Pet.") provided the following chart in a section entitled "Specific Statutory Grounds on which the Challenge is Based (37 C.F.R. § 42.104(b)(2))." Pet., 10.

Ground	References	Basis	Claims Challenged
1	Breivik II, Catchpole, Budziński, Fricke, Randolph	35 U.S.C. §103(a)	1-5, 7-15, 17-20
2	Breivik II, Catchpole, Budziński, Fricke, Randolph, Sampalis I	35 U.S.C. §103(a)	6, 16

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