

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIMFROST AS
Petitioner,

v.

AKER BIOMARINE ANTARCTIC AS
Patent Owner.

Case IPR2020-01533

U.S Patent No. 9,816,046

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. 9,816,046 (the “ ’046 patent”) are unpatentable. (FWD, 39-40).

I. Statement of Relief Requested

In the FWD, the Board held the challenged claims were unpatentable as obvious, concluding: claims 1-10 were unpatentable over Breivik II, Yoshitomi, Budziński, Fricke, Bottino II and Sampalis I (Ground 1); claims 11-12 were unpatentable over Breivik II, Yoshitomi, Budziński, Fricke, Bottino II and Randolph (Ground 2); and claims 13-19 were unpatentable over Breivik II, Yoshitomi, Budziński, Fricke, Bottino II, Randolph and Sampalis I (Ground 3). FWD, 39. However, as stated by the Board in Footnote 15: “As noted above, we have considered Petitioner's grounds without relying on Breivik II.” FWD, 39. Thus, the Board actually found the claims obvious over sub-combinations (*i.e.*, combinations not including Breivik II) of the combinations 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 all three of the Instituted Grounds specifically combined and relied on Breivik II. As a result, Aker contends that

Petitioner did not meet its burden of establishing obviousness because Breivik II is not prior art, rendering all of the 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 '046 Patent contains claims to methods of extracting krill oil with specific properties from a krill meal that has been stored from 1 to 36 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., 11.

Ground	References	Basis	Claims Challenged
1	Breivik II, Yoshitomi, Budziński, Fricke, Bottino II, Sampalis I	35 U.S.C. §103(a)	1-10
2	Breivik II, Yoshitomi, Budziński, Fricke, Bottino II, Randolph	35 U.S.C. §103(a)	11, 12
3	Breivik II, Yoshitomi, Budziński, Fricke, Bottino II, Randolph, Sampalis I	35 U.S.C. §103(a)	13-19

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