

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIMFROST AS

Petitioner

v.

AKER BIOMARINE ANTARCTIC AS

Patent Owner

Case No.: IPR2020-01534

U.S. Patent 10,010,567

Issue Date: July 3, 2018

Title: Bioeffective Krill Oil Compositions

**PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE
PURSUANT TO 37 C.F.R. § 42.24(c)**

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I. INTRODUCTION

Each claim of the U.S. Patent No. 10,010,567 (“the ‘567 patent”) requires krill oil having less than 3% free fatty acids. As evidence that this limitation is taught and disclosed in the prior art, Petitioner relies on Dr. Tallon’s testimony that the Station 11 *Euphausia superba* krill lipid extract reported in Table 2 of Bottino II has less than 2% free fatty acids.

The Board has already found five other patents in the same patent family as the ‘567 patent (*i.e.*, continuations of the same nonprovisional application) unpatentable, rejecting Patent Owner’s arguments that those patents were not obvious. In this proceeding, Patent Owner changes tack and, with the exception of Bottino II, does not contest the teachings of the prior art references relied on by Petitioner nor dispute that a POSITA would have been motivated to combine those references. Instead, Patent Owner offers two meritless technical arguments regarding Table 2 of Bottino II: (1) the results reported in Table 2 fail to disclose the free fatty acid content of the Station 11 *Euphausia superba* krill extract; and (2) the Table 2 results are unreliable. Patent Owner’s expert, Dr. Jaczynski, even goes so far as to proclaim “a POSITA would be discouraged from drawing any conclusions about the actual lipid content” of the extracts described in Bottino II. Patent Owner’s arguments regarding Bottino II and efforts to refute Dr. Tallon’s

detailed testimony that Bottino II teaches and discloses a krill extract having at most 2% free fatty acid are not only technically spurious, but are also belied by Dr. Jaczynski's own publications.

First, Table 2 identifies 98% of the lipid components found in the Station 11 *Euphausia superba* krill extract, and a POSITA would have understood that any free fatty acids in that extract would necessarily be located in the remaining 2% fraction labeled "unknown." Nevertheless, relying a technically flawed comparison of the thin layer chromatography results reported in Bottino II and the chromatograph appearing in Freeman & West, Patent Owner argues that the "unknown" fraction cannot contain any free fatty acids and that Bottino II does not disclose an extract with less than 3% free fatty acids. However, the analytical method used in Bottino II is different from the method described in Freeman & West. Additionally, Bottino II analyzed actual *Euphausia superba* krill, whereas Freeman & West simply analyzed various "lipids standards." Thus, any inference Patent Owner seeks to draw from a comparison of the thin layer chromatography results reported in Bottino II to the Freeman & West chromatograph is technically baseless, and is tantamount to comparing "apples to oranges."

Second, the assertions by Patent Owner and its expert that the results reported in Table 2 of Bottino II "cannot be considered reliable," and that a

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