

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIMFROST AS
Petitioner

v.

AKER BIOMARINE ANTARCTIC AS
Patent Owner

CASE IPR: IPR2020-01534

U.S. Patent No. 10,010,567 B2

PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY

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United States Patent and Trademark Office
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

All of the asserted Grounds rely on Bottino II for the “less than 3% w/w free fatty acids” limitation, including Ground 1 which is the Ground asserted against both independent claims (claims 1 and 15). The combined references in the Grounds fail to provide this claim element. As a result, Petitioner has failed to present any Grounds which establish a *prima facie* case of obviousness.

Petitioner continues to allege that the “unknown” fraction of the Station 11 krill extract of Bottino II (Ex. 1038) contained free fatty acids. Petitioner’s Reply (“Reply”; Paper 14). There is no dispute that Bottino II discloses that the “unknown” fraction included unidentified lipids that migrate between diglycerides and triglycerides in the thin layer chromatography (TLC) method utilized by Bottino II. However, in continuing to make this argument, Petitioner ignores the the irrefutable evidence that in the TLC method used by Bottino II, based on the method of Freeman and West (Ex. 2002), free fatty acids **do not** have an R_f between that of diglycerides and triglycerides. Based on the only relevant evidence, the “unknown” fraction does not include free fatty acids.

In an attempt to direct attention away from this irrefutable evidence, Petitioner points to a number of other cherry-picked references that disclose TLC methods where free fatty acids do have an R_f between that of diglycerides and triglycerides. However, this approach is not scientifically valid as none of those

references use solvent systems that are the same as or similar to Bottino II or Freeman and West. Further, Petitioner and its expert have provided no supporting literature references or experimental evidence that shows that the slight changes between the Bottino II method and the Freeman and West method (*i.e.*, deletion of 0.2 parts acetic acid in solvent system 1 and use of a different silica gel) would have any impact on how free fatty acids migrate in relation to diglycerides and triglycerides as specifically disclosed in Freeman and West. Dr. Tallon's speculative expert testimony on this issue is unsupported by any evidence or record and should be ignored.

II. COLLATERAL ESTOPPEL DOES NOT APPLY

Petitioner briefly addresses collateral estoppel at p. 4 of its Reply, alleging that the references in the Grounds had previously been considered by the Board. In making this argument, Petitioner for some reason focuses on the cholesterol limitation appearing in two of the dependent claims. This is an attempt to side-step the issue raised by Patent Owner in its Response (Paper 9; "PO Response") that both **independent** claims of the '567 patent include the limitation of "less than 3% w/w free fatty acids" which had not been previously addressed in any decision by the Board. PO Response at 10-12. As explained in the PO Response, this is a completely new claim element that has not been previously adjudicated and which

materially alters the question of invalidity. *Id.* at 11. Petitioner's attempt to redirect the Board's attention to a different claim limitation in the dependent claims regarding cholesterol both ignores Patent Owner's arguments which specifically apply the relevant standards for collateral estoppel and evidences a misunderstanding of the law of collateral estoppel. Indeed, Petitioner has made no attempt to address PO's arguments in its Response regarding the applicable elements for establishing whether collateral estoppel exists.

III. GROUND 1 SHOULD BE DENIED

The Ground 1 combination of Sampalis II, Bottino II and Randolph does not teach or suggest the claim limitation of "less than 3% w/w free fatty acids" as required by both independent claims. As a result, Petitioner has failed to meet its burden of establishing a *prima facie* case of obviousness.

It cannot be disputed that Bottino II teaches that the data for the Station II krill lipid extract reported in Table 2 was obtained by TLC using the method of Freeman and West with three slight modifications: 1) the silica gel Adsorbosil-5 was used instead of silica gel-G; 2) 0.2 parts of acetic acid was eliminated from solvent mixture 1; and 3) gravimetry was used for quantitation of the spots

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