

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte PETER M.J. BEDDING and
FRANKLIN L. PELLEGRINI

Appeal No. 2006-1878
Application No. 10/435,367

HEARD: September 12, 2006

Before GRIMES, GREEN, and LEOVITZ, Administrative Patent Judges.

LEOVITZ, Administrative Patent Judge.

DECISION ON APPEAL

This appeal involves claims to a dietary supplement for treating and/or inhibiting digestive tract ulcers. The examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 134. We affirm.

Background

The application describes a dietary supplement which treats and prevents the occurrence of digestive tract ulcers in horses and other animals. Horses are foragers. Specification, ¶ 13. When allowed to graze, they typically begin feeding in early morning and continue until well after dark. Id., ¶ 14. The meals are small, but relatively continuous. To accommodate this feeding strategy, the horse digestive system

continuously produces gastric acid and bile secretions from the liver into the foregut.

Id., ¶ 7. Most domesticated horses are not kept in pastures where they can forage all day, but instead are fed intermittently with concentrated low volume feed. Id., ¶ 15.

This type of diet can cause problems for horses, resulting in a high incidence of digestive tract disorders. Id., ¶¶ 16-18. A recent study showed that approximately 55% of randomly sampled horses had gastric ulcers, and 40% had colonic ulcers. Id., ¶ 3.

The instant application provides a dietary supplement that “efficaciously” treats digestive tract ulcers in horses. Id., ¶ 23. This is accomplished using a dietary supplement which strengthens the mucous stomach lining, slows the passage of food through the stomach, and increases the integrity of the stomach’s mucous membrane wall. Id., ¶¶ 27-32. Preferred ingredients which achieve these effects are polar lipids, soluble fiber, and surfactant amino acids, respectively. These three components are stated to “yield a synergistic result substantially more efficacious than a sum of the results which would be produced if each ingredient by itself was used.” Id., ¶ 38.

Discussion

Claim construction

Claims 1-29, 31-33, and 35-61 are on appeal. These are the only pending claims in this application. As summarized on page 4 of the Answer, there are four prior art rejections.

For the first rejection, Appellants provided arguments for each of the independent claims 1, 44, 57, 58, 60, and 61, and also for dependent claim 16. Brief, pages 14 and 28. Thus, these claims do not stand or fall together. For the second rejection,

Appellants provided separate reasons for the patentability of claim 43. Id., paragraph spanning pages 39-40. This claim does not stand or fall with the other claims in the rejection. Appellants did not separately address the patentability of claims in the remaining two rejections. These claims stand or fall together.

We begin with claim construction because that is necessary to understand the scope and meaning of the claims to reach the question of obviousness. Independent claim 1 is representative since it contains the same three components present in all the independent claims.

1. A dietary supplement for use in treating and/or inhibiting digestive tract ulcers, comprising:
 - a polar lipid supplement which strengthens the mucous gut membrane lining the inside wall of the stomach;
 - a soluble fiber which slows the passage of foodstuffs ingested together with the dietary supplement through the stomach; and
 - a nutricine which increases the integrity of digestive tract membranes.

We also reproduce claim 43, since it was separately argued:

43. A feed supplement for use in treating and/or inhibiting digestive tract ulcers in horses or other animals, comprising:
 - an oat oil-based polar lipid supplement;
 - β -glucan (beta-glucan) soluble fiber;
 - a surfactant amino acid-based nutricine which increases the integrity of digestive tract membranes;
 - a nutricine which absorbs mycotoxins and/or pathogens in the digestive tract; and
 - a pH balancer that is added to the other ingredients in the feed supplement to keep the pH of the feed supplement at an approximately neutral pH level.

The dietary supplement claimed in claim 1 contains three components: polar lipid, soluble fiber, and a nutricine. The polar lipid “strengthens the mucous gut membrane” in the stomach. According to the specification, this involves “producing

additional cations, or positive ions, to counteract the anions, or negative ions, in the gastric acid.” Specification, ¶ 27. Polar lipids are utilized to achieve this effect. Id., ¶ 28, ¶ 48. The specification provides guidance on the types and amounts of the polar lipid that may be present in the dietary supplement. Id., ¶ 49, 69. The claim element, itself, however, does not contain any express words that would limit the quantity of polar lipid in the supplement. The limitation that it strengthens the mucous gut membrane refers to a property or characteristic of the lipid when administered, but does not serve as a requirement that the amount of lipid present in the supplement be actually effective to achieve this effect. Consequently, as we interpret the claim, any amount of polar lipid in a dietary supplement would be sufficient to meet this claim limitation. The soluble fiber and nutricine components have the same construction as the polar lipid supplement, where the component is required to have a specific property (“slows passage of foodstuff”; “increases” digestive tract integrity), but not to be present in a quantity necessary to achieve a result.

During prosecution, the Board is required to give claims their broadest reasonable interpretation consistent with the specification. In re Bond, 910 F.2d 831, 833, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990). In the absence of clear and explicit wording in the claim that the recited components are present in amounts effective to treat and/or inhibit ulcers, we conclude that the claimed dietary supplement reads on the presence of these components in ineffective amounts, even in trace amounts.

In reaching this construction, we have recognized that the claim’s preamble states that the supplement is for use in treating ulcers. Preamble language that merely states the purpose or intended use of an invention is generally not treated as limiting the

scope of the claim. See Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp., 320 F.3d 1339, 1345, 65 USPQ2d 1961, 1965 (Fed. Cir. 2003); Rowe v. Dror, 112 F.3d 473, 478, 42 USPQ2d 1550, 1553 (Fed. Cir. 1997). If the body of the claim “sets out the complete invention” and does not recite essential structure that is important to the invention or necessary to give meaning to the claim, the preamble is not ordinarily treated as limiting the scope of the claim. Schumer v. Lab. Computer Sys., Inc., 308 F.3d 1304, 1310, 64 USPQ2d 1832, 1837 (Fed. Cir. 2002); NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282, 1305-06, 75 USPQ2d 1763, 1781 (Fed. Cir. 2005). Thus, we decline to interpret the preamble to require that the supplement is actually effective for this purpose.

Obviousness under § 103

McKeown and Howes

Claims 1, 2, 4, 11-21, 25-36, 41, 42, 44, 45, 47-51, 53-58, 60, and 61 stand rejected under 35 U.S.C. § 103 as obvious over McKeown¹ in view of Howes².

According to the Examiner, McKeown teaches a feed supplement containing glutamine, triglyceride, and fiber. Office action dated May 6, 2004, page 3; Answer, page 8, lines 10-11. This disclosure is stated to meet the limitations of claim 1, but not the requirement that it contain a nutricine “which absorbs and eliminates mycotoxins and/or pathogens in the digestive tract.” However, “Applicants admit in their Specification that Mycosorb and Biomox are known nutricines that are administered to

¹ McKeown et al. (McKeown), U.S. Pat. No. 5,660,852, issued Aug. 26, 1997

² Howes et al. (Howes), U.S. Pat. No. 6,045,834, issued Apr. 4, 2000

horses at page 24. Also, the Examiner provides the Howes reference as a teaching for Mycosorb.” Office action dated May 6, 2004, page 3. See also Answer, pages 8-9.

Appellants argued that the combination is improper because “the cited references are completely unrelated and provide neither any teaching or suggestion . . . which could justify the combination.” (Underlining removed.) Brief, at page 22.

Appellants also argued that McKeown teaches a feed supplement to treat ketosis (id., page 25); Howes teaches a composition that is “mixed with animals feeds to bind mycotoxins” (id.); and the skilled artisan would not have be motivated to add Howes supplement to McKeown because “the elimination of mycotoxins is not relevant to a supplement used to treat ketosis in cattle during parturition.” Id., page 26. Appellants also argued that McKeown does not show “a soluble fiber nor any other ingredient which could slow the passage of foodstuffs through the stomach.” Id., page 28.

Claim 1 requires three components: a polar lipid to strengthen the gut membrane, a soluble fiber to slow food passage, and a nutricine which increases the integrity of digestive tract membranes. The Examiner stated that all three elements could be found in McKeown. For this reason, we first look to its disclosure.

McKeown describes a food supplement which contains a gluconeogenic compound and a fatty acid. McKeown, Abstract; column 5, lines 18-21. Glutamine is listed as a suitable gluconeogenic compound in the feed supplement. Id., column 5, lines 26-33. As pointed out by the Examiner (Answer, page 8, line 10), glutamine is also described in the Appellants’ application as a nutricine which “increases the integrity of digestive tract membranes.” See Specification, ¶ 32. Thus, we are in agreement with the Examiner that this disclosure meets the recited limitation in the claims.

Appellants maintained that a nutricine which increases the integrity of the digestive tract was not taught by the combination of McKeown and Howes (Brief, pages 29-30), but in making this argument, they apparently ignored McKeown's teaching that glutamine – which they admit fulfills this purpose – be included in its feed supplement. Accordingly, we do not find merit in their argument.

In addition to the gluconeogenic compound, a fatty acid is also present in McKeown's feed supplement. McKeown, column 5, lines 18-20; column 6, lines 7-12. Palm seed oil is listed as an example (id., column 6, lines 7-12), which is also described in the instant specification as a suitable source of polar lipid (Specification, page 21, lines 1-5). Appellants did not challenge the Examiner's finding that McKeown's fatty acid meets the polar lipid limitation. We have no reason to conclude differently.

The other component present in claim 1 is a “soluble fiber which slows the passage of foodstuffs ingested together with the dietary supplement through the stomach.” We have construed this limitation to require that the soluble fiber have the capability to slow the movement of food from the stomach, but not to require that the amount of fiber present in the supplement is in fact effective to achieve this result. McKeown teaches that “inert carriers” may be present in the supplement. As an example, the patent lists about thirteen different plant materials, including corn, oat and other grains and grasses. McKeown, column 6, lines 38-42; column 9-10, claim 1. Although no support was cited for the presumption that these plant materials would

inherently contain soluble fiber, we find it reasonable in view of the dictionary definition of fiber which indicates it is from a plant source³.

Appellants did not rebut this reasonable presumption. “Indeed, as anyone who is even the least bit familiar with horses will rapidly recognize, oats fed to horses will pass quickly through the stomach.” (Underlining removed.) Brief, page 28. This argument rests on the mistaken belief that claim 1 requires that the soluble fiber be present in amounts that would affect the food’s transit through the stomach. In our construction, even trace amounts would suffice to meet the soluble fiber limitation. Accordingly, we do not find Appellants’ argument to be persuasive.

Claim 16 was separately argued. This claim specifies that the soluble fiber is beta-glucan. Appellants contend that beta-glucan is “neither taught nor suggested” by the cited prior art. Brief, page 28. While there may be no explicit mention of beta-glucan, its presence in the dietary supplement would be certain because, as admitted in the instant application (§ 52), it is a component of oat which, as discussed earlier, is described in McKeown’s supplement along with other disclosed plant materials and grains.

In sum, as stated by the Examiner, McKeown teaches all three elements of the claimed composition. Answer, page 8, lines 10-11; page 13, lines 3-5; page 15, lines 14-16. Inasmuch as all three elements required by claim 1 are taught by McKeown, we also find that claim 1 is anticipated under § 102(b). Since “anticipation is the epitome of obviousness,” we do not designate this as a new ground of rejection.

³ Fiber: “a filamentous matter from the bast tissue or other parts of plants.” The Random House College Dictionary, Revised edition, Random House, Inc., 1975, page 490.

Connell v. Sears, Roebuck & Co., 722 F.2d 1542,1548, 220 USPQ 193, 198 (Fed. Cir. 1983).

Claims 2, 4, 11-21, 25-27, 30, 34, 41, 42, 44, 45, 47-51, 56-58, and 60 were not separately argued.⁴ Consequently, we affirm the rejection of these claims under the same grounds. In regard to claim 16, for the reasons set forth above, we find that this separately argued claim is also anticipated under § 102(b) by McKeown.

Howes

The Examiner cited the Howes patent for its teaching of a nutricine that removed mycotoxin from animal feeds as recited in claims 28, 29, 31-33, 35, 36, 53-55, and 61. Answer, paragraph spanning pages 8-9. Contrary to Appellants' argument, we agree with the Examiner that Howes' teaching is relevant to McKeown's feed. The Howes patent describes a composition that is capable of binding to mycotoxins which are present in animal feeds. It is a combination of yeast cell wall extract and clay. Howes, Abstract. "When admixed with feed or fed as a supplement, the compositions with their surprisingly increased mycotoxin-binding capacity, decrease absorption or uptake of the mycotoxins by the affected animal, thereby improving performance and health, and reducing the incidence of mycotoxin-associated diseases." Id., column 3, lines 23-28. Howes describes the composition as generally beneficial to all animal feeds. "The compositions provided by the present invention can be added to any commercially available feedstuffs for livestock or companion animals including, but not limited to,

⁴ Appellants stated that independent claims 1, 43, 44, 57, 58, 59, 60, and 61 were separately argued (Brief, page 14), but only indicated what the claims recite (Brief, pages 28-30). "A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim." 37 C.F.R § 41.37(c)(1)(vii).

grains or pelleted concentrates.” Id., column 4, lines 49-52. Howes also does not limit the feed to a particular animal species or type. “The compositions provided by the invention can be fed to any animal including, but not limited to, avian, bovine, porcine, equine, ovine, caprine, canine, and feline species.” Id., column 3, lines 20-22.

A suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art. “[T]he teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” In re Kahn, 441 F.3d 977, 987-988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). See Answer, page 6, lines 15-19.

Even were Appellants correct that McKeown’s feed supplement is intended only for cattle before and after calving (Brief, page 37), we do not find this argument persuasive. Howes expressly teaches that its supplement can be added to any animal feed. This would include a feed fed to all cattle, as well as a feed administered to a more restricted set. The skilled worker reading Howes would have recognized that all feeds which contain grains are susceptible to mycotoxin contamination, and would have been motivated to have added Howes’ composition to McKeown’s supplement. Consistent with this conclusion is Appellants’ own specification, which indicates the commercial availability of mycotoxin absorbents (¶ 58), and which have apparently been utilized in the prior art for horse feeds (Briggs, August 2002 cited in Appellants’ Information Disclosure Statement).

“An applicant may rebut a prima facie case of obviousness by providing a ‘showing of facts supporting the opposite conclusion.’ Such a showing dissipates the prima facie holding and requires the examiner to ‘consider all of the evidence anew.’ Rebuttal evidence may show, for example, that the claimed invention achieved unexpected results relative to the prior art.” In re Kumar, 418 F.3d 1361, 1368, 76 USPQ2d 1048, 1052 (Fed. Cir. 2005) (internal citations omitted).

We recognize that the instant application states “the dietary supplement of the present invention” yields a “synergistic” result. Specification, ¶ 26. However, we do not find that the examples beginning on page 29 show evidence of synergy, i.e., that the combination shows substantially more effect than any of the ingredient’s acting alone. Id., ¶ 26. For the foregoing reasons, we conclude that the Examiner has provided adequate evidence to establish a case of prima facie obviousness. On the record before us, we do not find a sufficient showing to rebut it. Accordingly, this rejection is affirmed as it relates to claims 28, 29, 31-33, 35, 36, 53-55, and 61.

McKeown, Howes, and Kanter

Claims 3, 5-10, 43, and 46 stand rejected under 35 U.S.C. § 103(a) as unpatentable over McKeown in combination with Howes, and further in combination with Kanter⁵.

The Examiner rejected dependent claims that required oat oil as the source of the polar lipid over the Kanter patent. Kanter describes “highly stable” oat oil that also

⁵ Kanter et al. (Kanter), U.S. Pat. No. 6,410,067, issued Jun. 25, 2002

contains other oils, including conjugated linoleic acid. Kanter, Abstract, column 2, lines 5-21. According to the Examiner, it “would have been obvious to a person of ordinary skill in the art to substitute one known supplemental oil/triglyceride for another.” Office action dated May 6, 2004, page 4. The Examiner also stated that the skilled artisan would have been motivated to add oat oil to McKeown’s supplement in order to reduce the incidence of gastric ulcers caused by high carbohydrate feed. Answer, page 13.

Appellants argued that “[t]he addition of the Kanter et al. fat supplement, which uses oat oil to prevent the fat supplement from becoming rancid, has no purpose or function which would suggest its addition to” McKeown or Howes. Brief, page 38.

We are not persuaded by Appellants’ arguments. Obviousness does not require an express suggestion to have modified the prior art. Kahn, 441 F.3d at 987-88, 78 USPQ2d at 1336. Knowledge of a problem and how to solve it may substitute for explicit directions. Id. Kanter states that fat sources utilized in feeds “all have short shelf-lives under field conditions and will tend to become rancid.” Kanter, column 1, lines 14-20. Fat is an essential component of McKeown’s supplement. McKeown, Abstract. The skilled worker would have recognized that McKeown’s feed supplement is susceptible to becoming rancid because of the presence of fats, but would have known from Kanter that replacing at least a portion of the fat with oat oil would have solved the problem. In our view, this establishes adequate motivation to have modified McKeown’s supplement with Kanter’s teaching. Since Appellants have not given sufficient reason to rebut this, we shall affirm the rejection as it applies to claims 3, 5-10, and 46.

Claim 43 was separately argued by Appellants because it contains a pH balancer which is not described in McKeown, Howes, or Kanter. Brief, page 41. We agree with Appellants that the Examiner erred in including this claim in the rejection. Further below, we designate a new ground of rejection for claim 43 over McKeown, Howes, Kanter, and Sawhill.

McKeown, Howes, and Sawhill

Claims 37-40 and 59 stand rejected under 35 U.S.C. § 103(a) as unpatentable over McKeown in combination with Howes, and further in combination with Sawhill⁶.

These claims require the presence of a “pH balancer.” The Examiner considered it obvious to have included a pH balancer in McKeown’s supplement in view of the Sawhill patent which describes the addition of buffers in animal diets to avoid changes in pH that occur after food ingestion. Sawhill, column 1, line 5-64. “At the time the invention was made, it would have been obvious to a person of ordinary skill in the art to add a buffer to a feed supplement to maintain a pH that is safe for the livestock.” Office action dated May 6, 2004, page 5; Answer, page 14.

Appellants challenged the rejection. “The addition of the feed supplement block of Sawhill, which is a lick block for cattle to counter low pH in the rumen . . . has no purpose or function which would suggest its addition to either the ketosis-inhibiting feed supplement of McKeown et al. or the mycotoxin-eliminating composition of Howes et al.” Brief, page 48.

As we understand the rejection, the Examiner is relying on Sawhill for the

⁶ Sawhill, U.S. Pat. No. 4,729,896, issued Mar. 8, 1988

teaching that it was known by the skilled worker to add buffers to animal feeds to adjust their pH to a desired level. In its background section, Sawhill describes the practice of adding buffers to feed to control the digestive tract's pH. Sawhill, column 1, line 5-55. The buffers can be prepared as blocks fed on a "free-choice basis" (column 1, lines 45-57) or added to the normal dry mix diet (column 1, lines 38-41). In its examples, Sawhill describes a feed supplement that, in addition to the buffer, contains molasses, urea, corn gluten, feather meal, and fat. Id., columns 7-10. In this context, we concur with the Examiner that the skilled worker would have recognized the benefit of adding buffer to animal feeds or supplements. Appellants' characterization of Sawhill as teaching a "lick block for cattle" fails to consider what the reference teaches as a whole.

Claim 43

Claim 43 is rejected under 35 U.S.C. § 103(a) over McKeown, Howes, and Kanter as applied to Claims 3, 5-10, and 46, and further in view of Sawhill.

This is a new ground of rejection under 37 C.F.R. § 41.50(b). The rejection of claims 3, 5-10, and 46 is addressed above. Claim 43 contains the further limitation that a pH balancer is present. For the reasons stated above as applied to claims 37-40 and 59, we find it would have been obvious to the skilled artisan to have included a pH balancer to have arrived at the claimed food supplement.

McKeown, Howes, and Schaefer

Claims 22-24 and 52 stand rejected under 35 U.S.C. §103(a) as unpatentable over McKeown in combination with Howes, and further in combination with Schaefer⁷.

Appellants did not specifically traverse the rejection over the Schaefer patent. In their Brief, it was stated that this “ground of rejection is not being specifically appealed because it relates only to dependent claims which will be patentable if the independent claims upon which they depend are found to be patentable.” Brief, line spanning pages 13-14. Accordingly, we summarily affirm this rejection for the reasons discussed above.

All references cited in the rejection are related

Appellants argued that the Examiner had improperly combined the references because they were unrelated to the problem addressed in their application. Brief, page 15; Reply brief, page 5. We address this argument separately because Appellants considered it a serious defect in the rejection, referring to it repeatedly in their briefs.

The five references cited by the Examiner are completely unrelated (both to each other and the claimed invention) other than the fact that they all relate generally to dietary supplements ... Since each of the references deals with a different unrelated problem, and since none of the references deal with the problem contemplated by the present invention, there would have no reason for one skilled in the art to make the combinations of references made by the Examiner.

Brief, page 15.

To establish obviousness, the Supreme Court in Graham v. John Deere, 383 U.S. 1, 148 USPQ 459 (1966) has required that the following factors be taken into consideration:

⁷ Schaefer et al. (Schaefer), U.S. Pat. No. 5,505,968, issued Apr. 9, 1996

- (a) the scope and contents of the prior art;
- (b) the differences between the prior art and the claimed subject matter;
- (c) the level of skill in the pertinent art; and
- (d) evidence of secondary considerations.

After considering the record before us, it is our view that the scope and content of the prior art clearly establishes that animal diets are routinely put together from a variety of different sources and components. Appellants admit in the specification that the racehorse diet “typically consists of a mixture of grains, molasses, nutrients, and feed additives, usually with minimal hay in the form of one or two flakes with each meal.” Specification, ¶ 15. McKeown’s formulation of a gluconeogenic compound and fatty acid is characterized as “feed supplement product” which is “added to the feed for ruminants.” McKeown, column 5, lines 18-19. Diet supplementation is also Kanter’s objective, where a “neutraceutical” supplement containing stable oat oil is formulated. “The supplement may be administered in various forms, such as a top dress liquid, or may be included as an ingredient in a complete nutritional supplement.” Kanter, column 2, lines 34-37. These facts show that it was conventional in the art to combine components from many sources to create dietary feeds for animals. Furthermore, the prior art indicates that the skilled artisan was familiar with the process of choosing nutrient sources to formulate a feed with proper nutrient content. With this background, we find that the art reasonably suggests combining nutritive supplements to have arrived at the claimed invention.

Appellants urged that there is no motivation to have combined the references because the “references being combined in the Section 103(a) rejections are not being

used for the same specific purpose, or indeed, for any single purpose, and none of the references serve the same purpose as the purpose of the present invention.” Reply brief, page 5. McKeown, Appellants argued, is to treat ketosis, and “has nothing to whatsoever to do with treating or preventing ulcers.” Id., page 6. The same statement was made with respect to Howes and Kanter.

The flaw in this argument is that the claimed subject matter is not restricted to ulcer prevention or treatment. While Appellants may have discovered that the claimed components in the appropriate quantities treat or prevent ulcers, this concept is not reflected in the claims, which are the object of this appeal. As we have already pointed out, the claims contain no limitation, express or inherent, that would limit them to a purpose relating to ulcer therapy. None of the appealed claims are directed to methods for treating digestive tract ulcers. Answer, page 7, lines 15-18. Any reason to have combined the elements identified in the prior art would therefore be adequate motivation. In re Dillon, 919 F.2d 688, 693, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990) (in banc).

In affirming these rejections, we do not find ourselves prey to “the insidious effect of hindsight.” See In re Kotzab, 217 F.3d 1365, 1369, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000). Appellants argued that the rejection was “nothing more than the use of Appellants’ claims as a blueprint to go and search for the elements of the claims.” Brief, page 24. This argument overlooks the fact that McKeown describes a composition which contains all three components required by claim 1 and other independent claims. For the addition of a nutricine that absorbs mycotoxins and/or a pH balancer, adequate

reason has been provided by the Examiner for the skilled artisan to have combined the references to have arrived at the claimed subject matter.

Summary

The Examiner's rejection of claims 1-29, 31-33, 35-42, and 44-61 over prior art is affirmed. Claim 43 is subject to a new ground of rejection.

Time Period for Response

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

This decision contains a new ground of rejection pursuant to 37 CFR § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 CFR § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

AFFIRMED, 37 CFR 41.50(b)

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Appeal No. 2006-1878
Application No. 10/435,367

Page 20

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