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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARK E. KNUTH, PETER R. BEETHAM, KEITH A. WALKER,
and BERNHARD D. KUEBITZ

Appeal 2018-002294
Application 12/810,142
Technology Center 1700

Before KAREN M. HASTINGS, MICHAEL P. COLAIANNI, and
JANE E. INGLESE, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

This is in response to a Request, filed October 21, 2019, for rehearing of our Decision dated August 29, 2019.

Appellant argues that the Board misapprehended the material fact that the Examiner's calculations regarding the amounts of the various components in the mixtures disclosed by Demmering are not supported by Demmering's teachings (Req. Reh'g. 2). Appellant contends that the Examiner's calculations fail to appreciate that Demmering is directed to mixtures of components A, B, and C (Req. Reh'g. 3). Appellant argues that Demmering teaches that component A may be present in the mixture in the range from 58% to 95% and component B may be present in the amount ranging from 4% to 40% (Req. Reh'g. 3). Appellant argues that in a

particular mixture where component A is present in an amount of 95% of the composition, then component B cannot be present in an amount of 40% (Req. Reh'g. 3). Appellant contends that Demmering teaches the following mixtures at the extremes of the ranges: (1) 95% component A, 4 to 5% component B and balance component C or (2) 58 to 60% component A, 40% component B and balance component C (Req. Reh'g. 3). Based on mixture (1), Appellant calculates that the amount of the mixture would include 65.8 wt% of saturated fatty acids having 12 to 18 carbons and monounsaturated fatty acids having 12 to 18 carbons as opposed to the claimed range of 80 to 100% (Req. Reh'g. 4). Appellant calculates that Demmering's mixture (1) would also have 34.3% of polyunsaturated fatty acids and saturated fatty acids having more than 12 carbons as opposed to the claim requirement of less than 20% (Req. Reh'g. 4). Appellant calculates that mixture (2) would have 21.6% polyunsaturated fatty acids and saturated fatty acids having more than 12 carbons as opposed to the claim requirement of less than 20%. Appellant contends that Demmering's mixture (2) would further have 78.4% of saturated fatty acids having from 8 to 12 carbon and monounsaturated fatty acids having 12 to 18 carbons unlike the claim requirement of from 80 to 100% (Req. Reh'g. 4). Appellant argues that the extreme limits of the range of component A cannot exist with the extreme limits of the range of component B in a mixture (Req. Reh'g. 6). Appellant contends that the claimed ranges do not overlap or lie inside ranges disclosed in the prior art (Req. Reh'g. 6). Appellant argues that moving from 40% of component B to 4% component B in Demmering would lead away from the claimed amounts within the ranges (Req. Reh'g. 5). Appellant contends that it is factually

impossible to arrive at the claimed amount based on Demmering's teachings (Req. Reh'g. 6).

Although Appellant argues that these arguments should not be considered new arguments (Req. 6), we note that the Board raised this issue with Appellant during oral argument where similar arguments were made (Tr. 5). Appellant indicated that this argument was not made in the Briefs (Tr. 5). In other words, Appellant's argument is new to the record as not having been raised in the principal Brief or Reply Brief and is improper for being raised in a rehearing request. 37 C.F.R. § 41.52(a) ("Arguments not raised . . . pursuant to §§ 41.37, 41.41, or 41.47 are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) through (a)(4) of this section.").

Nevertheless and contrary to Appellant's argument, our analysis on pages 3 to 6 of the Decision is based on the Examiner's analysis of Demmering's teachings regarding the amount of component A and component B in mixture with one another. On page 4 of the Decision, we noted, "The Examiner's calculations on pages 7–8 and 11–14 of the Answer establish that the exemplified embodiment includes a composition with ranges of the various fatty acid esters that either overlap or *are very close* as to abut the ranges recited in the claims." (Emphasis added). Appellant's calculations support that amount of saturated fatty acids having 8 to 12 carbons and monounsaturated fatty acids having 12 to 18 carbons (78.4%) and the amount of polyunsaturated fatty acids and saturated fatty acids having more than 12 carbons (21.6%) are close to the claimed ranges (i.e., 80 to 100% of saturated fatty acids having 8 to 12 carbons and monounsaturated fatty acids having 12 to 18 carbons and less than 20% of

polyunsaturated fatty acids and saturated fatty acids having more than 12 carbons) (Req. Reh’g. 5). In other words, Demmering’s embodiment where component A is 60% of the mixture and component B is 40% of the mixture yields fatty acid ester ranges that are very close to those ranges recited in claim 1 by Appellant’s own calculations. The proximity of Demmerings values are so close that one of ordinary skill in the art would have expected Demmering’s biodiesel composition to have similar properties as those disclosed by Appellant. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 783 (Fed. Cir. 1985). Appellant has not provided any evidence of criticality in the claimed ranges.

We adhere to our decision for the reasons discussed above.

Appellant’s rehearing request is denied.

Outcome of Decision on Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Denied	Granted
1, 141–159	103(a)	Demmering	1, 141–159	
Overall Outcome			1, 141–159	

Final Outcome of Appeal after Rehearing:

Claims	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 141–159	103(a)	Demmering	1,141–159	
Overall Outcome			1, 141–159	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136.

Appeal 2018-002294
Application 12/810,142

DENIED