



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes application details for Arnulf TRÖSCHER and examiner SMITH, PRESTON.

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

DBRIPDocket@faegredrinker.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ARNULF TRÖSCHER, NINA CHALLAND,
JOHANNA TROESCHER, and FRANZISKA TROESCHER

Appeal 2019-004679
Application 14/696,996
Technology Center 1700

Before ADRIENE LEPIANE HANLON, JAMES C. HOUSEL, and
MICHAEL G. McMANUS, *Administrative Patent Judges*.

McMANUS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ seeks review of the Examiner’s decision to reject claims 18–21 and 27–31. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies BASF SE as the real party in interest. Appeal Brief (filed Nov. 19, 2018, hereinafter “Appeal Br.”) 2.

CLAIMED SUBJECT MATTER

The present application generally relates to “the use of natural or synthetic green fodder flavors as feed additive for ruminants.” Specification (filed April 27, 2015, hereinafter “Spec.”) 1, ll. 1–2. The Specification describes “green fodder” as “feedstuffs in which all of the plant, mostly fresh, can be fed. Examples which may be mentioned are: grass, corn, cereal, clover and legumes.” *Id.* at 2, ll. 24–25. The Specification teaches that green fodder flavors may be used “for increasing the feed intake (kg/d) and/or for increasing the frequency of feed intake (feed intake frequency).” *Id.* at 5, ll. 12–14. The Specification additionally teaches that, in an embodiment, “the green fodder flavors comprise hexanal and/or at least one monounsaturated or polyunsaturated analog thereof.” *Id.* at 5, ll. 19–21.

Claim 29 is illustrative of the subject matter on appeal and is reproduced below with certain language bolded for emphasis:

A method **for increasing the feed intake frequency of dairy cows**, wherein feed is administered to the dairy cows, which feed is supplemented with a feed additive comprising natural or synthetic **green fodder flavors**, wherein the green fodder flavors comprises at least one C₆-breakdown product of long-chain fatty acids.

Appeal Br. (Claims App.) (emphasis added).

REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Goers	US 4,806,379	Feb. 21, 1989
Bruggemann ²	US 2003/0176500 A1	Sept. 18, 2003
Norton	US 2013/0309351 A1	Nov. 21, 2013

REJECTIONS

The Examiner maintains the following rejections:³

1. Claims 21 and 27–31 are rejected under 35 U.S.C. § 103 as unpatentable over Norton in view of Bruggemann. Final Action (mailed June 18, 2018, hereinafter “Final Act.”) 3–4.
2. Claims 18–20 are rejected under 35 U.S.C. § 103 as unpatentable over Norton in view of Goers and Bruggemann. *Id.* at 4.

DISCUSSION

Rejection 1. The Examiner rejects claims 21 and 27–31 as obvious over Norton in view of Bruggemann. *Id.* at 3–4. In support of the rejection, the Examiner finds that “Norton teaches administering animal feed to animals such as cattle (para 27) wherein the feed affects behavior (para 35).” *Id.* at 3. The Examiner also finds that “Norton further teaches enhancing feed intake (para 71).” *Id.* at 4–5.

² Although Molly is the first listed inventor, we follow the Examiner’s practice of referring to this reference as “Bruggemann” in the interest of consistency. *See* US 2003/0176500 A1, code (76).

³ The Examiner additionally rejected claim 22 as anticipated by Norton. Final Act. 2. Claim 22 was canceled by amendment dated Sept. 5, 2018 (entered Sept. 18, 2018).

The Examiner further finds that Bruggemann “teaches feed compositions having these c6 [sic, C₆] compounds are known in the art.” *Id.* at 3 (citing Bruggemann, Abstract). The Examiner determines that one of ordinary skill in the art would have had reason “to incorporate such products to enhance antimicrobial properties (para 021). This would be beneficial since the products of Norton are drawn to feeding young animals which have developing digestive tracks.” *Id.*

Appellant argues that the rejection is flawed because “Norton does not give any hint to use the flavor, in particular any green fodder flavor, in order to affect the eating behavior of dairy cows, i.e. to increase the frequency of feed intake.” Appeal Br. 10. Appellant similarly argues that “Bruggemann does not refer to [a] method of affecting the eating behavior of dairy cows.” *Id.* Appellant additionally argues that a person of ordinary skill in the art, seeking a method of increasing the feed intake of dairy cows, would not have had reason to combine the teachings of Norton and Bruggemann. *Id.* at 10–11.

Appellant’s argument that Norton does not teach to use green fodder flavor to affect eating behavior is not persuasive of error. Independent claim 29 (from which all claims at issue depend) requires “[a] method for increasing the feed intake” that includes the administration of feed supplemented with “green fodder flavors.” Appeal Br. (Claims App.). The claim does not require that the green fodder flavors *cause* the increase in feed intake. Here, Norton teaches the use of a particular starter feed (RAMP® Starter Feed) to increase the dry matter intake of calves during certain time periods. Norton ¶ 71; *see id.* Figs. 7 and 8. Accordingly,

Appellant has not shown error in the Examiner's finding that Norton teaches a method for increasing feed intake.

Bruggemann teaches "a feed composition for an animal comprising a feed supplement containing one or more medium chain fatty acids." Bruggemann, Abstract. Bruggemann specifically teaches to use medium chain fatty acids such as caproic acid (C₆) to inhibit microbial contamination. *Id.*

The Examiner finds that one of skill in the art would use the fatty acid compounds taught by Bruggemann in order to enhance antimicrobial properties. Final Act. 3. Appellant argues that "Bruggemann does not refer to [a] method of affecting the eating behavior of dairy cows and thus does not at all seem to be relevant for a discussion of inventiveness of the claimed subject matter." Appeal Br. 10. This argument is not persuasive of error. In considering obviousness, a tribunal is "not limited to the same motivation that may have motivated the inventors." *Par Pharm., Inc. v. TWI Pharm., Inc.*, 773 F.3d 1186, 1197 (Fed. Cir. 2014) (citing *Alcon Research, Ltd. v. Apotex Inc.*, 687 F.3d 1362, 1369 (Fed. Cir. 2012) ("We have repeatedly held that the motivation to modify a prior art reference to arrive at the claimed invention need not be the same motivation that the patentee had.")). Accordingly, Appellant has not shown error in the Examiner's stated reason to combine the teachings of Norton and Bruggemann.

In view of the foregoing, we determine that Appellant has not shown error in the rejection of claims 21 and 27–31.

Rejection 2. The Examiner rejects claims 18–20 as obvious over Norton in view of Goers and Bruggemann. Final Act. 4.

In support of the rejection, the Examiner finds that Norton teaches administering an animal feed that affects behavior. *Id.* (citing Norton ¶ 35). The Examiner further finds that “Goer[s] teaches a feed additive comprising flavors and having cis 3 hexenal.” *Id.* The Examiner then determines that “[i]t would have been obvious to incorporate these substances into the product of Norton for purposes of enhancing the flavor (abstract of Goer[s]).” *Id.*

Appellant argues that Goers describes the use of green leaf essence to impart a fresh taste to human food but does not describe the “use of the green leaf essence as feed additive for affecting the eating behavior of dairy cows.” Appeal Br. 11. Appellant further argues that the references are directed to different problems and the Examiner has not shown an adequate reason to combine the teachings of the references. *Id.* at 11–12.

The Examiner finds that a person of ordinary skill in the art would have had reason to incorporate the flavors of Goer, including cis-3-hexenal, into an animal feed in order to enhance the flavor of the animal feed. Appellant indicates its disagreement but does not show specific error in the Examiner’s determination. Its assertion that the references are directed to different problems is unavailing – it is not necessary for the prior art to recognize the same problem and solution contemplated by Appellants. *See KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007) (“Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed”).

Additionally, as persons of scientific competence in the fields in which they work, examiners are responsible for making findings, informed

by their scientific knowledge, as to the meaning of prior art references to persons of ordinary skill in the art. Absent legal error or contrary factual evidence, those findings can establish a prima facie case of obviousness. *In re Berg*, 320 F.3d 1310, 1315 (Fed. Cir. 2003). Here, the Examiner makes a reasoned finding that one of skill in the art would regard the flavorants of Goers as appropriate for incorporation into the feed of Norton to enhance the flavor of the feed. In this regard, we note that Norton contemplates the addition of palatability agents such as flavorants to the animal feed. Norton ¶ 41. Appellant has not shown any specific error in this determination.

Accordingly, Appellant has not shown error in the stated reason to combine. Further, one may reasonably infer that enhancing the flavor of animal feed, as posited by the Examiner, would increase feed intake. In addition, as discussed above, Norton also teaches a method of increasing feed intake. Accordingly, Appellant has not shown that the references fail to teach a method for increasing feed intake that includes the use of a feed additive comprising green fodder flavors.

CONCLUSION

In view of the evidence and analysis set forth in the Final Action, the Examiner's Answer, and above, the Examiner's rejections are affirmed.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
21, 27–31	103	Norton, Bruggemann	21, 27–31	
18–20	103	Norton, Goers, Bruggemann	18–20	
Overall Outcome			18–21, 27–31	

Appeal 2019-004679
Application 14/696,996

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED