



# 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

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/946,185	11/19/2015	Yuanlong Pan	13731-US-NP	6812
69099	7590	09/17/2020	EXAMINER	
Nestle Purina Petcare Global Resources, Inc Checkerboard Square Intellectual Property Patents ST. LOUIS, MO 63164			SAYALA, CHHAYA D	
			ART UNIT	PAPER NUMBER
			1791	
			NOTIFICATION DATE	DELIVERY MODE
			09/17/2020	ELECTRONIC

**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):

purinapatentmail@purina.nestle.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* YUANLONG PAN, HUI XU, and  
SANDEEP BHATNAGAR

---

Appeal 2019–006710  
Application 14/946,185  
Technology Center 1700

---

Before KAREN M. HASTINGS, JEFFREY B. ROBERTSON, and  
JANE E. INGLESE, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner’s rejections of claims 1–3, 5–8, and 10–12. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).<sup>2</sup>

We AFFIRM.

---

<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Nestec S.A. (Appeal Br. 2).

<sup>2</sup> A Decision affirming the Examiner’s § 103 rejections of related subject matter in a co-pending application was mailed concurrently with this one (Appeal 2019–006721).

Independent claim 1 below is illustrative of the subject matter on appeal:

1. A method for preserving lean body mass and promoting fat loss during weight loss, the method comprising identifying a cat or dog that is obese or overweight and administering to the cat or dog a pet food composition in an amount from 70% to about 80% of the baseline maintenance energy requirement (MER) of the cat or dog, the pet food composition comprising:

from about 30% to about 65% protein,

from about 10% to about 20% carbohydrate,

from about 10% to about 15% fat, and

a moisture content from about 5% to about 20%;

wherein the protein and carbohydrate are in a ratio from about 4:1 to about 10:1.<sup>3</sup>

The following rejections under 35 U.S.C. § 112 are on appeal:

- 1) claims 1–3, 5–8, and 10–12, under first paragraph, as failing to comply with the written description requirement; and
- 2) claims 1–3, 5–8, and 10–12, under second paragraph, as indefinite.

The following rejections under 35 U.S.C. § 103 are on appeal:

- 3) claims 1–3, 5–8, 11, and 12 as unpatentable over the combined prior art of Schoenherr (US 2005/0025857 A1, published Feb. 3, 2005), Jewell (US 6,410,063 B1, issued June 25, 2002), Pan (US 8,193,240 B2, issued June 5, 2012), Blanchard (Geraldine Blanchard et al., *Rapid Weight Loss with a High-Protein Low-Energy Diet Allows the Recovery of Ideal Body Composition and Insulin*

---

<sup>3</sup> Note, Appellant’s Specification states that “about” encompasses plus or minus 20% (Spec. ¶ 26).

*Sensitivity in Obese Dogs*. (n.d.)) and Bierer (US 8,029,819 B2, issued Oct. 4, 2011);

4) claim 10 as unpatentable over the combined prior art of Schoenherr, Jewell, Pan, Jones ( US 5,962,043, issued Oct. 5, 1999) and Changing Times (Changing Times The Kiplinger Magazine, Vol. 31 (1977 ));<sup>4</sup>

5) claims 1–3, 5, 6, 8, 11, and 12 as unpatentable over the combined prior art of Bui (US 2007/0286889 A1, published Dec. 13, 2007), Jewell, and Pan;

6) claims 7 and 10 as unpatentable over the combined prior art of Bui, Jewell, and Pan, Krammer (US 2008/0085338 A1, published Apr. 10, 2008), and Changing Times.

## ANALYSIS

### *The § 112 rejection for failing to comply with the written description requirement*

For an applicant to comply with the 35 U.S.C. § 112, first paragraph, written description requirement, the applicant’s specification must “convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention.” *Carnegie Mellon Univ. v. Hoffmann-La Roche Inc.*, 541 F.3d 1115, 1122 (Fed. Cir. 2008)

---

<sup>4</sup> The Examiner did not list Blanchard and Bierer in the rejection of dependent claim 10 (Non-final Action 11), and these references were only discussed with respect to dependent claims 3 and 4 respectively (Non-final Action 9, 10).

(quoting *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991)).

Claim 1 recites that the pet food composition of claim 1 is fed in an amount “from 70% to about 80% of the baseline energy requirement (MER) of the cat or dog” (Appeal Br. 21, Claims App.). There is no dispute that the Specification explicitly describes this limitation (*e.g.*, Spec. ¶ 39). The Examiner’s rejection is based on the circumstances that MER is at best an estimate that may be difficult to establish or calculate with precision (Ans. 4, 5). The Examiner relies on paragraph 38 of the Specification which gives various non-limiting examples of how to calculate the MER of humans and animals (Ans. 4). The Examiner also questions the examples for a dog and a cat set out in that paragraph (*id.*).

Appellant contends that even though there are various ways to determine the MER, one of ordinary skill in the art would have known these ways of determining or calculating the MER of an animal, and since the Specification explicitly states feeding a dog or cat 70 to 80% of their respective MER, this adequately shows that Appellant had possession of a the claimed subject matter (Appeal Br. 6, 7; Reply Br. 2, 3).

While we appreciate the Examiner’s concern with the examples given for a dog and a cat in paragraph 38 of the Specification, there is adequate evidence that one of ordinary skill in the art would have known how to determine the MER of a dog or a cat (*e.g.*, *see* Appeal Br. 7). Indeed, Appellant’s Specification describes that baseline MER may be “determined over a period of [time] using [a] feeding trial; or indirect or direct calorimetry” (Spec. ¶15). We agree with the Examiner that determining such a MER is at best an estimate, dependent on various factors (*e.g.*, Ans.

17). However, in our view, this situation pertains to the breadth of the claimed subject matter, rather than the question of written description. The broadest reasonable interpretation of the claim language in light of the Specification permits one of ordinary skill in the art to determine the MER in any known manner. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (the scope of the claims in patent applications is determined by giving claims their broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art); *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (the specification is always highly relevant to the claim construction analysis, and is usually dispositive as it is the single best guide to the meaning of any disputed terms).

Thus, the description of determining baseline MER in Appellant's Specification appears to be as precise as the subject matter permits (*e.g.*, Spec. ¶¶ 15, 38). Accordingly, we agree with Appellant that a preponderance of the evidence supports Appellant's position that one of ordinary skill in the art would have understood that Appellant was in possession of the claimed subject matter. *Cf. Union Oil Co. of Cal. v. Atl. Richfield Co.*, 208 F.3d 989, 997 (Fed. Cir. 2000) (The claim need not use the same words as the specification; it is enough that one of ordinary skill in the art would recognize that the inventor invented what is claimed).

Accordingly, we reverse the Examiner's § 112 rejection for lack of written description.

*The § 112 rejection for indefiniteness*

During prosecution, claims are interpreted using "the broadest reasonable meaning of the words in their ordinary usage as they would be

understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.”

*In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Claims are definite if they “set out and circumscribe a particular area with a reasonable degree of precision and particularity. It is here where the definiteness of the language employed must be analyzed—not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.” *In re Moore*, 439 F.2d 1232, 1235 (CCPA 1971). However, “breadth [of a claim] is not to be equated with indefiniteness.” *In re Miller*, 441 F.2d 689, 693 (CCPA 1971).

The Examiner found the language of claim 1 indefinite, essentially for the same reasons the Examiner found the Specification lacked written description support; that is, since determining the baseline MER is at best an estimate and the claim requires feeding an amount of food from 70% to about 80% of the baseline MER, one would not know the metes and bounds of the claim.

Claim 1 is broad in the sense that it reads on a method of feeding 70–80 % of the baseline MER which may be determined by any known method of determining baseline MER for a dog or cat. However, claim 1 is not indefinite on the basis of its breadth alone. *In re Miller*, 441 F.2d at 693; *see also In re Gardner*, 427 F.2d 786, 788 (CCPA 1970) (“[B]readth is not indefiniteness.”). The Examiner has not explained sufficiently why one of ordinary skill in the art would not have understood how to use any one of the known method(s) of determining a baseline MER in the manner described in

the Specification and in Appellant's response (Spec. ¶¶ 15, 38; Appeal Br. 8; Reply Br. 4). As discussed previously, while we appreciate the Examiner's concern with the examples given for a dog and a cat in paragraph 38 of the Specification,<sup>5</sup> Appellant's Specification describes that baseline MER may be "determined over a period of [time] using [a] feeding trial; or indirect or direct calorimetry" (Spec. ¶ 15).

Appellant has also persuasively reasoned that the "baseline MER" language used in claim 1 "is as precise as the subject matter permits", similar to the situation in *Orthokinetics Inc. v. Safety Travel Chairs Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (The court found the claim phrase "so dimensioned as to be insertable through the space between the doorframe of an automobile and one of the seats thereof" to be as accurate as the subject matter permitted, since automobiles are of various sizes) (*see, e.g.*, Appeal Br. 8, 9; Reply Br. 3, 4).

In light of these circumstances, we agree with Appellant that one of ordinary skill in the art would have understood the broad scope of the claim in light of the Specification. Accordingly, we cannot sustain the Examiner's rejection of the claims as being indefinite.

---

<sup>5</sup> These examples include an example formula for a dog and a cat, respectively, which each use a single number to multiply with a dog's or cat's weight. The Examiner questions how Appellant derived these numbers (139 for dogs and 60 for cats (*e.g.*, Ans. 17)). However, even given that any specific MER will be an estimate that may be determined by different methods, a preponderance of the evidence establishes that one of ordinary skill in the art would have known how to determine such a baseline MER (estimate) for any specific dog or cat. Indeed, no rejection is before us based on lack of enablement.

*The § 103 Rejections*

Upon consideration of the evidence on this record and each of Appellant's contentions, we find that the preponderance of evidence supports the Examiner's conclusion that the subject matter of Appellant's claims is unpatentable over the applied prior art. We sustain all of the Examiner's § 103(a) rejections essentially for the reasons set out by the Examiner in the Non-Final Action and the Answer.

We add the following primarily for emphasis.

It has been established that "the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Likewise, it is also well settled that a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in the art would have reasonably been expected to draw therefrom. *See In re Fritch*, 972 F.2d 1260, 1264–65 (Fed. Cir. 1992).

Appellant contends that each § 103 rejection, whether based on Schoenherr or Bui, is deficient for the same reasons, which reasons focus on the teachings of Jewell and/or Pan. Specifically, Appellant argues that Jewell is directed to a diet that is high in fats in a range outside the claimed range of "about 10% to about 15% fat" (Appeal Br. 10, 11). Similarly, Appellant argues that Pan teaches an example of a low caloric diet with 6% fat (Appeal Br. 11), such that it is only with the use of impermissible hindsight that the teachings of Schoenherr or Bui is combined with Jewell and/or Pan.

These arguments are not persuasive of reversible error in the Examiner's obviousness rejections, because they fail to fully address the applied prior art and the inferences that one of ordinary skill in the art would have made therefrom. Each of Schoenherr and Bui describes a pet food composition useful for weight management with the claimed components in amounts that overlap each of the claimed ranges. Appellant does not dispute the Examiner's obviousness determination that through the use of no more than ordinary creativity, one would have used amounts of protein and carbohydrate such that the claimed range of ratios would have been achieved/selected based on either one of Schoenherr or Bui (*e.g.*, Ans. 10, 14). Thus, it is not even necessary to rely upon the fat content of either of Pan or Jewell. Jewell and/or Pan were applied by the Examiner to exemplify that one of ordinary skill in the art would have known to feed an animal 70% to about 80% less of their baseline MER in order to lose weight (*e.g.*, Ans. 21, 22).

As also pointed out by the Examiner, it is well known that calorie/energy restriction produces weight loss (*e.g.*, Ans. 14) such that feeding an overweight or obese dog or cat less than their MER is within the ordinary skill and common knowledge of an artisan. Furthermore, the Examiner discusses that Pan describes a useful fat content range of about 4–30 wt % fat that overlaps the claimed range (Pan, col. 11, ll. 54–58; Ans. 21). The Examiner states that Jewell's lower end of the range at 20% is close enough to the claimed about 15% for its teachings to be applicable (Ans. 21).<sup>6</sup>

---

<sup>6</sup> Appellant's Specification states that "about" encompasses plus or minus 20% (Spec. ¶ 26). Thus, "about 15%" as recited reasonably may encompass

In any event, even if the fat content of Pan and Jewell did not overlap the claimed ranges, the use of less food than required (by a pet's baseline MER) to lose weight using the food compositions encompassed by either of Schoenherr or Bui (which each exemplify food compositions with a fat content within the claimed ranges) is well within the level of ordinary skill in the art, whether it be 70 to about 80% less or some other amount less, using ordinary creativity and inferences based on the applied prior art in each rejection. *KSR Int'l*, 550 U.S. at 418; *see also id.* at 421 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”); *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009) (Under the flexible inquiry set forth by the Supreme Court, the PTO must take account of “*the inferences and creative steps,*” as well as routine steps, that an ordinary artisan would employ.); *see also KSR Int'l*, 550 U.S. at 417 (It is a well-established principle that, for an improvement to be patentable, it must be more than the predictable use of prior art elements, or steps, according to their established functions).

Appellant does not separately argue any other claim than claim 1, including separately rejected claims.

Accordingly, we affirm all of the Examiner's § 103 rejections (that is, rejections listed as 3–6 above).

---

or be very close to the about 20% fat content of Jewell, noting, however that the obviousness determination is not rendered deficient even if the Specification did not contain such a disclosure.

CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-3, 5-8, 10-12	112	Written Description		1-3, 5-8, 10-12
1-3, 5-8, 10-12	112	Indefiniteness		1-3, 5-8, 10-12
1-3, 5-8, 11, 12	103	Schoenherr, Jewell, Pan, Blanchard, Bierer	1-3, 5-8, 11, 12	
10	103	Schoenherr, Jewell, Pan, Jones, Changing Times	10	
1-3, 5, 6, 8, 11, 12	103	Bui, Jewell, Pan	1-3, 5, 6, 8, 11, 12	
7, 10	103	Bui, Jewell, Pan, Krammer, Changing Times	7, 10	
<b>Overall Outcome</b>			1-3, 5-8, 10-12	

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