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THOMPSON COBURN LLP ONE US BANK PLAZA SUITE 3500 ST LOUIS, MO 63101			ZILBERING, ASSAF	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JULIO PIMENTEL, KURT RICHARDSON, and DON WILSON

Appeal 2020-000029
Application 14/126,699
Technology Center 1700

BEFORE BEVERLY A. FRANKLIN, MERRELL C. CASHION, JR., and
JANE E. INGLESE, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 14–16 and 23–28. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ 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 Anitox Corporation. Appeal Br. 3.

CLAIMED SUBJECT MATTER

Claim 14 is illustrative of Appellant's subject matter on appeal and is set forth below:

14. A process for making pelleted animal feed or pet food, said process comprising:

i) diluting a stock solution with 10 to 200 parts water to make a heat-treating composition, said stock solution containing:

a) 10-30 wt%. of acetic acid;

b) 15 - 30 wt.% of a polysorbate-80 surfactant, an ethoxylated castor oil surfactant having an HLB from 4 to 18 and a molar ratio of 1 molecule of castor oil to 40 - 60 molecules of ethylene oxide, or a mixture thereof;

c) 5 - 20 wt.% of propylene glycol; and

d) 0 - 50 wt.% of water;

ii) applying about 1 to 10 wt. % of the heat-treating composition to an animal feed or pet food, wherein the applied heat-treating composition does not impart anti-fungal activity to the animal feed or pet food; and

iii) either pelletizing the mixture of the animal feed or pet food and the heat-treating composition with sufficient heat to make pelleted animal feed or pet food, or extruding and then pelletizing the treated animal feed or pet food with sufficient heat to make pelleted animal feed or pet food.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Samuelsson	US 6,379,723 B1	Apr. 30, 2002
Pimentel	US 2005/0170052 A1	Aug. 4, 2005
M N Hudha et al., <i>Effect of Acetic Acid on Growth and Meat Yield in Broilers</i> , 1 Int'l J. BioRes. 4, 31-35 (2010) ("Hudha").		
Thomas S. Winowiski, <i>Pellet Quality in Animal Feeds</i> , American Soybean Association (2001) ("Winowiski").		

THE REJECTION

Claims 14–16 and 23–28 are rejected under 35 U.S.C. 103(a) as unpatentable over Pimentel in view of Hudha, Samuelsson, and Winowiski.

OPINION

We review the appealed rejections for error based upon the issues Appellant identifies, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”)). After considering the argued claims and each of Appellant’s arguments, and the Examiner’s position in the record, we are persuaded of reversible error in the appealed rejection for the reasons provided in the record by Appellant, with the following emphasis.

We refer to the Examiner’s Final Office Action for a complete statement of the rejection. Final Act. 3–7.

The dispositive issue in this case is whether the Examiner’s proposed modifications to the primary reference of Pimentel renders Pimentel unsatisfactory for its intended purpose?

Pimentel is directed to “a method for making a terpene-containing composition effective as a preservative comprising mixing a composition comprising a terpene, surfactant and water at a solution-forming shear until an oil/water emulsion is formed.” Pimentel ¶ [0017]. Appellant argues that the Examiner’s proposal to remove terpenes from the process in Pimentel renders Pimentel unsatisfactory for its intended purpose. Appeal Br. 9. Appellant explains that terpenes are the effective ingredient required in

Pimentel. Appeal Br. 9; *see, e.g.*, Pimentel, ¶¶ [0008], [0009], [0011]–[0018].

We agree that Appellant has identified reversible error in the Examiner’s determination of obviousness.

The Examiner does not explain persuasively why one skilled in the art would remove a critical ingredient, such as terpene, from Pimentel’s composition to arrive at the claimed invention. The Examiner’s reasoning that “it would have been obvious to a skilled artisan to have modified Pimentel and to have eliminated terpenes and their antifungal function, if the antifungal function was not desired” (Ans. 10) is contrary to Pimentel’s express teachings. Thus, while the Specification discloses that fungicides for poultry and swine integrators may not be needed because the feed is consumed quicker than the time it takes for mold and fungus to develop (Spec. 2–3; Ans. 10), the Examiner has not provided “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *quoted with approval in KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

Furthermore, the Examiner offers no explanation as to how Pimentel’s composition, modified as proposed by the Examiner, would be suitable for Pimentel’s purpose of a composition “effective against various infective agents including bacteria, viruses, mycoplasmas, and/or fungi present in drinking water, feed and major feed ingredients.” Pimentel ¶ [0015]. “If the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification.” *In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984). “If the proposed modification or combination of

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the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious.” *In re Ratti*, 270 F.2d 810, 813 (CCPA 1959).

In view of the above, we reverse the rejection.

CONCLUSION

We reverse the Examiner’s decision.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Reversed	Affirmed
14–16, 23–28	103(a)		14–16, 23–28	

REVERSED