

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAYER CROPSCIENCE LP,
Petitioner,

v.

EXOSECT LIMITED,
Patent Owner.

Case PGR2017-00018
Patent 9,380,739 B2

Before CHRISTOPHER L. CRUMBLEY, CHRISTOPHER M. KAISER,
and MICHELLE N. ANKENBRAND, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

DECISION
Institution of Post-Grant Review
37 C.F.R. § 42.208

INTRODUCTION

A. Background

Bayer CropScience LP (“Petitioner”) filed a Petition requesting post-grant review of claims 1–3, 5–8, and 10–12 of U.S. Patent No. 9,380,739 B2 (Ex. 1001, “the ’739 patent”). Paper 2 (“Pet.”). Exosect Limited (“Patent Owner”) did not file a Preliminary Response.

We have authority to determine whether to institute a post-grant review. 35 U.S.C. § 324(c); 37 C.F.R. § 42.4(a). The standard for instituting a post-grant review is set forth in 35 U.S.C. § 324(a), which provides that a post-grant review may not be instituted “unless the Director determines . . . it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.”

After considering the Petition, we determine that Petitioner has demonstrated it is more likely than not that at least one of the claims it challenges is unpatentable. Accordingly, we institute post-grant review.

B. Related Matters

The parties do not identify any pending infringement suits asserting the ’739 patent. Pet. 1; Paper 5, 2. Both parties note that the Canadian equivalent of the ’739 patent has been asserted in a patent infringement action in Canada, *Exosect Limited v. Bayer CropScience Inc.*, Federal Court File No. T-490-15. *Id.*

C. The Asserted Grounds of Unpatentability

Petitioner contends that claims 1–3, 5–8, and 10–12 of the ’739 patent are unpatentable based on the following grounds (Pet. 30–84):¹

Statutory Ground²	Basis	Challenged Claims
§ 112(b)	Indefiniteness of “electret”	1–3, 5–8, and 10–12
§ 112(b)	Indefiniteness of “controlling”	1–3, 5–8, and 10–12
§ 112(b)	Indefiniteness of “adheres more firmly”	1–3, 5–8, and 10–12
§ 112(a)	Lack of written description	1–3, 5–8, and 10–12
§ 112(a)	Lack of enablement	1–3, 5–8, and 10–12
§ 102	Exosect Press Release 1 ³	1–3 and 6–8
§ 103	Exosect Press Release 1	1–3 and 6–8
§ 103	Reichert ⁴ and Exosect Press Release 1	1–3, 5–8, and 10–12
§ 103	Reichert and Exosect Press Release 2 ⁵	1–3, 5–8, and 10–12

¹ Petitioner also relies on Declarations from Dr. Curt Raschke and Peter N. Marks. Ex. 1029 (“the Raschke Declaration” or “Raschke Decl.”); Ex. 1030 (“the Marks Declaration” or “Marks Decl.”).

² The relevant post-grant review provisions of the America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), took effect on March 16, 2013. 125 Stat. at 293, 311. Because the application from which the ’739 patent issued was filed after that date, our citations to Title 35 are to its post-AIA version. Section 4(c) of the AIA re-designated 35 U.S.C. §§ 112(1), (2) as 35 U.S.C. §§ 112(a), (b), respectively, effective September 16, 2012. 125 Stat. at 296–297.

³ PRLog, Exosect Press Release, “Exosect CEO, Martin Brown, to address CropWorld North America conference 2012” (Feb. 6, 2012) (Ex. 1012, “Exosect Press Release 1”).

⁴ Reichert et al., US 2015/0072857, published Mar. 12, 2015 (Ex. 1040, “Reichert”).

⁵ Exosect Press Release, “Exosex SPTab launched at Expocida” (Feb. 23, 2012) (Ex. 1013, “Exosect Press Release 2”).

D. The '739 Patent

The '739 patent issued on July 5, 2016, from the 35 U.S.C. § 371 national-stage application of International Application No. PCT/GB2013/000153, which was filed on April 3, 2013. The PCT Application claims priority to six UK patent applications, all of which were filed on April 4, 2012. Ex. 1001, 1:7–12; *see* Ex. 1003; Ex. 1004; Ex. 1005; Ex. 1006; Ex. 1007; Ex. 1008.

The '739 patent relates to “[m]ethods and uses of controlling the flowability of a population of plant seeds and dust drift therefrom by placing individual seeds in contact with particles of a flowability enhancing agent.” Ex. 1001, at [57]. “[D]uring haulage and storage movement” of plant seeds, friction between the individual seeds can lead to erosion of the seed coat, which creates dust and “causes a loss of viability to a significant fraction of the seeds.” *Id.* at 1:22–34. Moreover, some seeds are coated or pelleted, and erosion in these cases can cause the loss into the environment of other elements of the coating or pelleting material, including “pesticides and/or fertilizers.” *Id.* at 1:34–45.

In addition, it is important for plant seeds to be able “to flow or slide past each other,” because this allows the flow of seeds in storage and sowing equipment to be controlled so as to minimize damage to the seeds or blocking of the equipment. *Id.* at 1:49–58. This property, called “flowability” in the '739 patent, is improved conventionally using “a mineral earth component such as talc, diatomaceous earth or kaolin as a drying agent.” *Id.* at 1:58–62. The '739 patent teaches that these drying agents “tend to detach from plant seeds over time.” *Id.* In addition, these agents can “cause clumping of seeds,” leading to “blockages in sowing equipment.”

Id. at 1:63–66. Further, seed coatings conventionally are applied “in the form of wet slurry,” requiring additional drying steps. *Id.* at 1:66–2:8. The ’739 patent notes that there are “[c]ommercial preparations of coated seeds” that “are alleged to be free flowing,” but that these preparations “tend to have complex coatings that inter alia make use of several polymer layers and other components that are expensive to produce.” *Id.* at 2:9–13. Thus, according to the ’739 patent, “[t]here exists a need to provide seeds for planting that have improved flowability and improved dust drift control over conventional seeds.” *Id.* at 2:14–16.

The ’739 patent describes solving this problem “by placing the plant seeds of a mass of seeds in contact with dry free flowing particles of a flowability enhancing agent that is made up of at least one species of electret particle made up of a wax.” *Id.* at 2:17–21. These electret particles are described as “adher[ing] more firmly to the plant seeds than do particles that comprise a dry free flowing substance that is or includes a mineral earth component.” *Id.* at 2:22–24. According to the ’739 patent, this “[t]ypically” causes the seeds to be “more free-flowing than conventional plant seed populations” and to “exhibit reduced clumping of seeds within the seed mass than conventional plant seed populations.” *Id.* at 2:25–29. The ’739 patent describes several examples of its invention, applying carnauba wax particles under the trade name Entostat to “soya bean seed,” “perennial rye grass,” “cotton,” “maize,” “wheat seed,” and “oilseed rape.” *Id.* at 11:10–24:55.

E. Illustrative Claims

Of the challenged claims of the ’739 patent, claims 1 and 6 are independent and illustrative. They recite:

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