

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CYANOTECH CORPORATION  
Petitioner

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS  
Patent Owner

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Case IPR2013-00401  
Patent 5,527,533

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Before WILLIAM V. SAINDON, SCOTT E. KAMHOLZ, and  
SHERIDAN K. SNEDDEN, *Administrative Patent Judges*.

SNEDDEN, *Administrative Patent Judge*.

DECISION

Petitioner's Request for Rehearing  
*37 C.F.R. § 42.71*

## I. INTRODUCTION

Petitioner Cyanotech Corporation filed a request for rehearing (Paper 22) of the Board’s decision, dated Dec. 19, 2013 (Paper 17), which instituted *inter partes* review of claims 1-15, 21, 22, and 26 of U.S. Patent No. 5,527,533 (“the ’533 patent”). For the reasons stated below, Cyanotech’s request is denied.

## II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988). *See also* 37 C.F.R. § 42.71(d) (“The request must specifically identify all matters the party believes the Board misapprehended or overlooked”).

## III. DISCUSSION

*Inter partes* review of the ’533 patent was instituted on the following grounds:

- (i) Claims 1, 3, 8-15, 21, 22, and 26 as anticipated under § 102(b) by Grangaud; and
- (ii) Claims 1-15, 21, 22, and 26 as obvious under § 103(a) over Grangaud and Dowling.

The remaining grounds of unpatentability proposed in the petitions were denied as redundant to the above grounds or deficient. Decision 12-19.

In the Decision, the Board denied *inter partes* review of claim 16, which recites a method of treating an individual suffering from age-related macular degeneration. Cyanotech asserts that claim 16 should be instituted because it

recites a species within the genus of degenerative retinal disease recited in claim 26, which was instituted. Req. Reh'g. 1-4. We are not persuaded. A single disclosed species can anticipate an entire genus, however, disclosure of a genus does not necessarily anticipate a species. *In re Berg*, 140 F.3d 1428 (Fed.Cir., 1998); *cf. Atofina v. Great Lakes Chem. Corp.*, 441 F.3d 991, 999 (Fed. Cir. 2006) (“[A] very small genus can be a disclosure of each species within the genus”). In its petition, Cyanotech made no credible assertion that the nature of the genus of claim 26 is such that the disclosure of a species of the genus should be considered anticipatory. The Board could not have misapprehended or overlooked an argument not presented sufficiently in the petition. Cyanotech has otherwise shown no abuse of discretion in the Decision.

Cyanotech also asserts that Massonet is not redundant as to claims 16-25 and 27 and is not redundant as to preventive use of astaxanthin because Massonet provides, in more detail and scope than Grangaud, information related to the preventive and the curative effects of astaxanthin in the tissues in which astaxanthin accumulated. Req. Reh'g. 4-8. Petitioner's arguments are not persuasive. The Board is charged with securing the just, speedy, and inexpensive resolution of every proceeding. 37 C.F.R. § 42.1(b). A redundancy designation may result from a petitioner's failure to articulate a meaningful distinction in terms of relative strengths and weaknesses with respect to application of the prior art disclosures to one or more claim limitations. In its petitions, Cyanotech did not explain how or why any of the prior-art combinations of the denied grounds are any more relevant to the claims than those of the grounds on which the review was instituted, nor was such a distinction apparent to us.

In its request for rehearing, Cyanotech asserts that Massonet is relevant to the preventive administration of astaxanthin. In its petitions, however, Cyanotech did not construe the term “treating” to include preventive use of astaxanthin, and

we adopted Cyanotech's construction of this term for purposes of the Decision. Decision 8. Thus, we were not persuaded that the stated differences between Massonet and Grangaud are relevant to the claims in a manner that is not redundant. Cyanotech has shown no abuse of discretion in the Decision in this regard and may not use a Request for Rehearing to augment its prior, unsuccessful, arguments.

#### IV. ORDER

Accordingly, it is hereby

ORDERED that Petitioner's request for rehearing is *denied*.

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