

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 No.: 5,527,533

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**PATENT OWNER'S RESPONSE TO PETITIONER'S OBJECTIONS  
TO EVIDENCE PURSUANT TO 37 C.F.R. §42.64**

Pursuant to 37 C.F.R. § 42.64(2), Patent Owner provides this memorandum and supplemental evidence in response to Petitioner's Objections to Evidence dated March 28, 2014.

**A. Objections to Foundation**

Petitioner's object to Patent Owner exhibits ("POX") 2016-2020, 2022, 2024, 2025 and 2027 because "they have not been authenticated as required by Federal Rule of Evidence (FRE) 901." A party authenticates a document by presenting evidence sufficient to support a finding that the document is what the

party claims it to be. *See* FRE 901(a). The party must show that it has a rational basis for its claim, which it may show through circumstantial evidence. *United States v. Wadena*, 152 F.3d 831, 854 (8th Cir. Minn. 1998); *see also*, *Anwar v. Fairfield Greenwich Ltd.*, 742 F.Supp.2d 367, 372 n.3 (S.D.N.Y. 2010) (rejecting plaintiff’s argument that copies of agreements had not been properly authenticated where affiant stated that she had “review[ed]” the same). Documents that bear the parties company logo, among other identifiers, are indicative of authenticity. *See, e.g., In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 293 (3d Cir. 1983); *FTC v. Hughes*, 710 F. Supp. 1520, 1522 (N.D. Tex. 1989). The fact that documents are located in the adverse party’s production (and thus its possession) is enough to authenticate them. *See, e.g., United States v. Black*, 767 F.2d 1334, 1342 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985).

The following discussion and supplemental evidence eliminates any alleged doubts as to the authenticity of POX 2016-2020, 2022, 2024, 2025 and 2027-2031.

### **POX 2016**

POX 2016 is a webpage published by the Macular Degeneration Association providing general information about macular degeneration that remains available on the internet. (<http://macularhope.org/about-md/>, last visited April 11, 2014.) This webpage describes what macular degeneration is and whom it typically affects.

## **POX 2017**

POX 2017 is an informational article about age-related macular degeneration published by Bayer that remains available on the internet. ([http://press.healthcare.bayer.com/html/pdf/presse/en/electronic\\_press\\_kits/vegf\\_trap-eye/AMD\\_Backgrounder\\_final.pdf](http://press.healthcare.bayer.com/html/pdf/presse/en/electronic_press_kits/vegf_trap-eye/AMD_Backgrounder_final.pdf), last visited April 11, 2014.) This article describes what ARMD is, who it typically affects, and how it can be treated.

## **POX 2018**

POX 2018 is a press release dated January 24, 2013, from Nutrex-Hawaii, Inc. (“Nutrex”), a wholly-owned subsidiary of Petitioner, Cyanotech Corporation, published in the Digital Journal. When asked about POX 2018, Brent Bailey, the Chief Executive Office of both Nutrex and Cyanotech, testified that he had no reason to think that the press release (POX 2018) was not from Nutrex-Hawaii. (Bailey March 26, 2014 Depo. Tr. at 175:4-177:10.) The press release ends with the following statement: “About Nutrex-Hawaii Founded with the goal of harnessing the benefits of microalgae to alleviate malnutrition and promote health, Nutrex-Hawaii is a global leader in microalgae products. Learn more at Nutrex-Hawaii.com”. The press release also states that Asthaxanthin is sold online at Nutrex-Hawaii.com and that members of the press can receive a free version of a book “by emailing [traci\(at\)nutrex-hawaii\(dot\)com](mailto:traci@nutrex-hawaii.com).” There are numerous indicia

confirming that this document was a press-release from Nutrex-Hawaii, a wholly-owned subsidiary of Petitioner Cyanotech.

### **POX 2019**

POX 2019 is the transcript of an interview of Dr. Gerald Cysewski (Chief Scientific Officer at Cyanotech) by Dr. Mercola. Dr. Cysewski testified that he was not sure on the exact date but that he definitively recalled Dr. Mercola interviewing him about the health benefits of natural asthaxanthin. (Cysewski March 7, 2014 Depo. Tr. at 43:11-44:7.) Dr. Cysweski testified that the time spent at the interview, including travel expenses, was spent as part of his job as Chief Scientific Officer at Cyanotech. (Cysewski March 7, 2014 Depo. Tr. 44:8-45:6.) Dr. Cysewski testified about the location, purpose, and substance, of the interview. (Cysewski March 7, 2014 Depo. Tr. at 43:11-50:12.) When asked about specific answer provided in POX 2019, Dr. Cysewski testified that he made the statements. (Cysewski March 7, 2014 Depo. Tr. 45:7-50:12.) The interview to which this transcript corresponds is still available via YouTube at [http://www.youtube.com/watch?v=eM\\_R6qInUZI](http://www.youtube.com/watch?v=eM_R6qInUZI) (the statement for which Patent Owner's cite POX 2019 appears at 7:43) and an abbreviated version of the video is available at <http://articles.mercola.com/videos.aspx> (the statement for which Patent Owner's cite POX 2019 appears at 15:08).

## **POX 2020**

POX 2020 is a printout from the website of Nutrex-Hawaii dated May 14<sup>th</sup>, 2011. The first page displays the Nutrex-Hawaii logo and the subsequent pages include “Nutrex Hawaii News”. *United States v. Black*, 767 F.2d at 1342.

Indeed, Petitioner produced a document bearing the identical text as POX 2020 bearing a production number ascribed to Petitioner Cyanotech pursuant to Patent Owner’s Requests for the Production of Document and Things. (Cf. POX 2020 with RA-00234287-293 (the text of both documents, including the date and authors, Bob Capelli and Dr. Gerald Cysewski, are identical).) RA-00234287-293 is a confidential document and has not been included as an exhibit hereto. Should Petitioner’s object to the characterizations made about RA-00234287-293, Patent Owner reserves the right to supplement its response. Additionally, Dr. Cysewski identified POX 2020 as “a printout of the Nutrex-Hawaii website or a couple pages from the Nutrex-Hawaii website” and that it was an article posted on the Nutrex website. (Cysewski March 7, 2014 Depo. Tr. at 51:1-20; 86:4-6.)

## **POX 2022**

POX 2022 is an article authored by Siri Khalsa in Nutrition News published in 2006. Mr. Capelli (Vice President of Sales and Marketing for Petitioner Cyanotech) testified that he recognized POX 2022, that the author of POX 2022 asked him for some literature and he provided it to her, that the author sent him

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