

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 MOTION TO SUBMIT SUPPLEMENTAL  
INFORMATION PURSUANT TO 37 C.F.R. §42.123(b)**

Pursuant to 37 C.F.R. § 42.123(b) and the Board's May 1, 2014 Order (Paper No. 38), Patent Owner hereby moves for leave to submit supplemental information in support of its Response (Paper No. 32). This information consists of statements by Petitioner in its brochures and communications with customers that raise significant questions about the primary reference upon which Petitioner relies. Patent Owner notified Petitioner of these documents—documents Petitioner created and already knew of—with more than sufficient time to avoid any potential risk of prejudice to Petitioner. Justice dictates that Petitioner's own statements concerning these issues be considered as part of the IPR proceedings it initiated.

Patent Owner seeks to submit two supplemental documents—a pair of emails containing information Petitioner provided to its customers. These two emails contain the following attachments:

- (1) A flyer bearing Cyanotech’s logo-entitled letterhead (Ex. A at RA015049–50);
- (2) A memorandum entitled “Cyanotech’s titer measurements versus our competitor’s” (Ex. A at RA015051); and
- (3) A four-page brochure for a Cyanotech product (Ex. B at RA023192–95).

The patent-at-issue is directed to methods of using astaxanthin. The primary referenced relied upon by Petitioner in this IPR, an obscure dissertation by Rene Grangaud (Cyan Ex. 1002), involved the administration of an oil that Grangaud reported as being astaxanthin. (*See* Pat. Owner’s Resp. (Paper No. 32) at pp. 9–10; Cyan Ex. 1002 at pp. 29–37.) Grangaud relied on a method called spectrophotometric analysis to show that the oil he isolated was in fact astaxanthin. (*Id.*) Patent Owner argued in its Response that this method was insufficient to confirm that the isolated substance was astaxanthin (as opposed to some other carotenoid, compound, or mixture thereof), or that the effects observed following administration of the oil to rats was due to astaxanthin (as opposed some other compound). (Pat. Owner’s Resp. (Paper No. 32) at pp. 27–31.) More specifically, Patent Owner argued that Grangaud’s spectroscopic analysis was unreliable and inconclusive because it does not differentiate astaxanthin from other carotenoids and related compounds. (*Id.*)

In the documents at issue, Cyanotech states that the spectrophotometric method used by Grangaud is an unreliable means for determining the presence of astaxanthin. (Ex. A at RA015049 (“The problem with the Spectrophotometric assay method is that, in addition to astaxanthin, other carotenoids such as lutein, canthaxanthin, and beta carotene are falsely included as astaxanthin in the results. Of even greater concern, chlorophyll and degradation products of astaxanthin without health benefits (such as astacene) will also be falsely included as asxatanthin in the results. . . . Purchasing astaxanthin from a supplier that uses Spectrophotometric analysis means that you can’t be sure if your astaxanthin is really astaxanthin”); *id.* at RA015051 (“The only valid way to accurately measure astaxanthin is the HPLC method used by Cyanotech”); Ex. B at RA023195 (“ [A] UV spectrophotometric analysis [ ] can falsely include other carotenoids and even chlorophyll and astacene (a breakdown bi-product of astaxanthin that has no health benefits) as astaxanthin”).) Thus, these documents contradict the conclusions set forth in Grangaud, and directly support Patent Owner’s Response. As these are Petitioner’s own statements, justice dictates that the Board consider them in reaching its decision.

Patent Owner was reasonably diligent and could not have reasonably obtained this information sooner. The two documents at issue were part of a

production consisting of over 100,000 pages.<sup>1</sup> As of the due date for Patent Owner's Response (March 21, 2014), Cyanotech had produced an *additional* 160,000 pages of documents.<sup>2</sup> Due to the large volume of documents with which Patent Owner was faced, Patent Owner did not discover the two emails that are the subject of this Motion until the week after it filed its Response. Patent Owner discovered these documents after running keyword searches in the course of preparing for the Rule 30(b)(6) deposition of Petitioner in the parallel litigation. Petitioner was questioned about one of the documents at the March 27, 2014 deposition (Ex. B, at RA023192–95 (marked as “Exhibit 182”).)

Consideration of the proposed supplemental information is in the interests of justice. First, the supplemental information is Petitioner's own statements and is directly relevant to an argument already set forth in Patent Owner's Response. Second, Patent Owner notified Petitioner of the supplemental information (and also provided Petitioner with copies of the documents) a full month before the date set

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<sup>1</sup> Cyanotech initially produced these documents on October 1, 2013, but did so without any confidentiality designation. Cyanotech subsequently requested that Petitioner destroy the documents received on October 1, 2013 and then produced a replacement set on October 29, 2013. (Patent Owner relied upon an incorrect bates number when indicating these documents were produced in December during the conference call with the Board.)

<sup>2</sup> To date, Petitioner's total production in the litigation consists of over 285,000 pages, with more to come.

for Petitioner's Reply,<sup>3</sup> and almost two full weeks before the deposition of Patent Owner's expert. Third, the proposed supplemental information does not give rise to any new arguments; to the contrary, it offers support to Patent Owner's already-filed argument that Grangaud's spectrophotometric analysis was unreliable and insufficient.

Patent Owner respectfully submits that it is only just that Petitioner be held to its own words and that Petitioner would not be prejudiced by any delay in the identification of these documents. For these reasons, Patent Owner requests that the Board authorize submission of the attached supplemental information.

Dated: May 2, 2014.

Respectfully submitted,

s/ Mark D. Schuman

Mark D. Schuman (Lead Counsel)

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<sup>3</sup> Patent Owner emailed the documents to Patent Owner, along with an explanation of the Patent Owner's intent to seek permission to submit them as supplemental information, on April 21, 2014.

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