

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CYANOTECH CORPORATION

Petitioner

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS

Patent Owner

Case IPR2013-00401¹

Patent 5,527,533

Before SCOTT E. KAMHOLZ, SHERIDAN K. SNEDDEN, and
GEORGIANNA W. BRADEN, *Administrative Patent Judges*.

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO SUBMIT
SUPPLEMENTAL INFORMATION

Submitted: May 6, 2014

¹ Consolidated with Case IPR2013-00404

I. INTRODUCTION

Patent Owner (PO) admits that the documents it wishes to belatedly submit were in its possession since at least October 29, 2013, that it was fully aware of the documents and their significance by the week of March 24, 2014, and that it delayed yet another month, until April 21, 2014, to notify Petitioner of its intent to use these documents. *See* PO's Motion 4, fns. 1-3, admitting these facts and that its previous claim to the Board of a December 2013 document receipt date was inaccurate. Patent Owner has proffered no meaningful excuse for these delays.

Additionally, the documents at issue are essentially meaningless. PO argues that the analytical method used in Grangaud to establish the presence of astaxanthin in the shrimp oil was not as precise as today's analytical standards and thus that Grangaud's shrimp oil may not have contained astaxanthin. PO's point is wrong and easily disproven. Petitioner's marketing materials newly referenced by PO are referring to UV absorbance assays and are therefore irrelevant because astaxanthin absorbs in the *visible* band as shown in Grangaud. Moreover, the broad single maximum absorption spectrogram of astaxanthin was independently confirmed by numerous earlier and subsequent researchers including Nobel Laureate, George Wald, to be the same as Grangaud reported. The irrefutable accumulation of astaxanthin in the shrimp species from which Grangaud extracted astaxanthin has also been confirmed by numerous subsequent researchers.

Baseless arguments are not in the “interests of justice.”

II. LEGAL STANDARDS

Under Rule 123(b), the proponent “must show why the supplemental information reasonably could not have been obtained earlier, and that consideration of the supplemental information would be in the interests of justice.” The “interests-of-justice” standard is higher than “good cause.” 77 Fed. Reg. 48622. PO’s failure to read documents in its possession does not qualify as “good cause.” *Hahan v. Wong*, 892 F.2d 1028, 1034 (Fed. Cir. 1989); *see also Huston v. Ladner*, 973 F.2d 1564 (Fed. Cir. 1992) (“attorney negligence” is not “good cause”; “good cause” requires proof that a late submitted declaration could not have been obtained and presented earlier). *See also Illumina, Inc. v. Columbia Univ.*, IPR2013-00011, Paper 87 at 5 (denying late submission because of failure to meet Rule 123(b) requirement).

III. DISCUSSION

A. Patent Owner Was Not Reasonably Diligent In Seeking or Submitting its Late Submission

PO is required to show it could not have reasonably obtained the late submission documents at an earlier time. Here, PO concedes it failed to read documents produced to it on October 29, 2013 for almost five months and then delayed another month in notifying Petitioner of its intention to use them.

PO does not explain why it made no effort to read the documents prior to the

week of March 24 other than to assert that they were part of a 100,000 page production, failing to note that the documents at issue were in the first 2,300 and 5,600 documents produced, respectively. PO also fails to note that the documents were produced in electronic, text searchable form and that depositions in the parallel infringement litigation, including the inventor's deposition, commenced on January 23, 2014. Yet, PO apparently waited until a March 27, 2014 deposition to finally review the documents it had for 5 months and then waited until April 21, 2014 to notify Petitioner and the Board of its intentions to submit these documents. Pat. Owner's Mot. 4, fns. 1-3.

As a result of these delays, Petitioner's time to prepare for the deposition of PO's witness was reduced by two-thirds and its time to locate a rebuttal expert and to prepare its Reply have been reduced by half. PO has offered no excuse for its prejudicial and apparently premeditated delay. For this reason alone, Patent Owner's motion should be denied.

B. Patent Owner's Scientific Argument is Baseless.

PO asserts that the documents at issue, comprised of Petitioner's marketing materials that refer to UV absorbance assays, support an argument that "the spectrophotometric analysis used by Grangaud is an unreliable means for determining the presence of astaxanthin." PO's Mot. at 3; and PO's Resp., Paper No. 32, at pp. 27-31. This point is irrelevant. For identifying astaxantin purity,

UV spectra are not applicable in Grangaud because astaxanthin absorbs in the *visible* band. In 1951, Grangaud's methods were state of the art and later research confirmed that Grangaud was correct that he had purified astaxanthin. Sergiu Amarie et al., *Excited state dynamics of the astaxanthin radical cation*, 373(1-2) Chemical Physics 8, 10 (2010) (Figs 1(A) and 2 (upper graph) showing astaxanthin absorption spectra in four different solvents, all of which show a smooth curve with a single, broad maximum).

Indeed, Grangaud's and Massonet's later journal articles (Cyan Exs. 1008 – 1018) confirmed that astaxanthin is the active ingredient in shrimp oil. And a concurrent journal article, Marie-Louise Josien et al., *Infrared Spectroscopy of Compounds having Biological Interest*, 73 J. American Chemical Soc. 4445-49 (Sept. 1951), shows that absorption spectroscopy was state of the art when Grangaud published his thesis. Even pre-1951 absorption spectrograms, prepared using various solvents, report the same, single maximum, broad absorption band that Grangaud reported. See Josef Tischer, 239(4-6) Z. Physiol. Chem. 257, 257-58 (1936)); George Wald, *The Photoreceptor Function of the Carotenoids and Vitamins A*, Vitamins & Hormones (1943), vol. 1, 195, 213 (1943) (Fig.3, upper graph). Modern research has also confirmed that astaxanthin (in free, monoester, and diester forms) is the predominant carotenoid in the carapace of *A. foliaceae* (the carapace area includes the cephalothorax, the source of Grangaud's shrimp oil).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.