

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AKER BIOMARINE, AS,  
Petitioner,

v.

NEPTUNE TECHNOLOGIES AND BIORESOURCES,  
Patent Owner.

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Case No. IPR2014-00003 & IPR2014-00556  
Patent No. 8,278,351

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Held: October 31, 2014

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Before: LORA M. GREEN, JACQUELINE WRIGHT BONILLA,  
and SHERIDAN SNEDDEN, Administrative Patent Judges.

The above-entitled matter came on for hearing on Friday, October 31, 2014, commencing at 10:00 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

Case No. IPR2014-00003 & IPR2014-00556  
Patent 8,278,351

APPEARANCES:

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P R O C E E D I N G S

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JUDGE GREEN: Good morning. Please be seated.

Welcome, everyone. This is the final oral hearing for joined cases IPR2014-00003 and IPR2014-00556. This involves patent number 8,278,351. We instituted this Inter Partes review on March 24th, 2014, and we joined the proceeding on July 29th, 2014.

At this time, we would like counsel to introduce yourselves and your colleagues, beginning with Petitioner.

MS. HOLLIS: Your Honor, this is Amanda Hollis from Kirkland and Ellis, I'm here on behalf of the Petitioners Aker and Enzymotec, with me is Mike De Vries and Elizabeth Cutri from my firm, Mitch Jones and Edward Braekke from Aker. We also have Elizabeth Holland. We will let her introduce her team.

MS. HOLLAND: Good morning, Your Honor, Elizabeth Holland for Petitioner Enzymotec and with me is Cynthia Hardman and Daniel Margolis.

JUDGE GREEN: Good morning, thank you. Patent Owner?

MR. GRAVES: Yes, good morning, Your Honor, Jonathan Graves from Cooley, LLP for Neptune Technologies and Bioresources, with me also from Cooley is Lauren Cunningham, behind her also from Cooley, Mr. Dean Farmer, and from Neptune, Benoit Huart, general counsel, and Dr. Fotini Sampalis, the named inventor.

1 JUDGE GREEN: Thank you very much. Welcome to  
2 the Board. Consistent with our previous order, each side has one hour  
3 to present our argument. Petitioner will proceed first, as to its case as  
4 to the challenged claims, and you may reserve rebuttal time if you  
5 would like. Thereafter, Patent Owner responds to Petitioner's case.

6 Counsel for Petitioner, do you have demonstratives?

7 MS. HOLLIS: Yes, Your Honor, may I approach with  
8 copies?

9 JUDGE GREEN: Yes, please. And do you have them  
10 for the court reporter and the opposite side?

11 MS. HOLLIS: Yes, Your Honor.

12 JUDGE GREEN: And would you like to reserve any  
13 rebuttal time?

14 MS. HOLLIS: Yes, Your Honor, I would like to reserve  
15 20 minutes for rebuttal, please.

16 JUDGE GREEN: Thank you very much. You may  
17 begin when you're ready.

18 MS. HOLLIS: Thank you, Your Honor. I would like to  
19 begin with the patent slide 1, please. What did Neptune say its  
20 invention was in this patent? It said its invention was a novel  
21 phospholipid, a new molecule, one that has EPA and DHA  
22 simultaneously attached. What do we now know? We know that this  
23 molecule absolutely was not novel. This molecule exists in nature, in  
24 krill, in nature, and it's extracted with nearly any polar extraction  
25 process, anything that takes out lipids.

1 Neptune didn't create this molecule. People have been  
2 extracting this molecule for years and years before its patent. We  
3 have shown this to you in so many ways. We have shown this to you  
4 with our tests. We looked at the extraction methods in Beaudoin, we  
5 used superba, we used pacifica, we used heat, we used no heat. We  
6 showed this to you with Dr. Haugsjerd's testing, with Dr. Budge's  
7 testing. We showed this to you with the tests of Fujita, the hexane  
8 method, the hexane methanol method, the hexane once through  
9 method. We showed you this with the Bergelson experiments. This  
10 molecule is extracted even with water.

11 This molecule is not novel. This was the basis for their  
12 patent. We should be done. Neptune's expert admits this. He says,  
13 these molecules exist in krill, in nature, and he doesn't know of any  
14 polar solvent that won't extract them.

15 So, now what do they say their invention is? They now  
16 say that they have invented a new process. They say that they  
17 deviated from the prior art processes because they didn't use heat, but,  
18 Your Honors, they don't cite the patent when they tell you this, and  
19 there's reason why. They don't talk about any new method of  
20 extraction, instead they say essentially the opposite.

21 Slide 9, please. They tell you that what they used to get  
22 their molecule was a method similar to the commonly owned prior art  
23 Beaudoin patent method, and they incorporate that entire patent by  
24 reference. They don't tell you that they deviated, they don't tell you

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