

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

Before The Honorable David P. Shaw  
Administrative Law Judge

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In the Matter of )  
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CERTAIN OMEGA-3 EXTRACTS FROM )  
MARINE OR AQUATIC BIOMASS AND )  
PRODUCTS CONTAINING THE SAME )  
)  
)  
\_\_\_\_\_ )

Investigation No. 337-TA-877

**THE AKER RESPONDENTS’ OPPOSITION TO COMPLAINANTS’ MOTION TO  
COMPEL THE AKER RESPONDENTS AND RELATED THIRD-PARTIES TO  
PRODUCE ALL RESPONSIVE DOCUMENTS AND TESTIMONY RELATED TO  
REEXAMINATION TESTING**

Complainants’ Motion to Compel<sup>1</sup> against the Aker Respondents<sup>2</sup> should be denied in its entirety. Complainants’ Motion attempts to manufacture a discovery dispute where none should exist and apparently was filed to deflect attention away from their own discovery deficiencies. It seeks three things: (1) additional deposition time with a witness that the Aker Respondents have *already agreed to provide*; (2) documents that the Aker Respondents *do not have*; and (3) discovery from a third-party witness regarding whom *Complainants never met-and-conferred and who, in any event, does not have any relevant information*. Thus, Complainants are unnecessarily burdening the Administrative Law Judge with a motion to compel discovery that Complainants have, are already getting, or that does not exist. Their motion should be denied.

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<sup>1</sup> Complainants’ Corrected Motion to Compel the Aker Respondents and Related Third-Parties to Produce All Responsive Documents and Testimony Related to Reexamination Testing, filed Sept. 9, 2013, is referenced herein as the “Motion to Compel” or “Motion.”

<sup>2</sup> The Aker Respondents include Aker BioMarine AS, Aker BioMarine Antarctic AS, and Aker BioMarine Antarctic US, Inc.

First, Complainants have no basis for moving to compel a second deposition of Aker's Chief Scientist, Dr. Nils Hoem. The privilege objections asserted by the Aker Respondents' counsel during Dr. Hoem's deposition were proper. Regardless, in the spirit of cooperation and to avoid unnecessary motion practice, the Aker Respondents agreed—before Complainants filed their Motion—to make Dr. Hoem available for further deposition. Complainants have provided no support for their request that any additional time occur at the offices of Complainants' counsel and at Respondents' expense.

Second, the Aker Respondents have repeatedly and consistently affirmed that they have produced all test data associated with the reexamination of the '348 patent<sup>3</sup> that is in their possession, custody, and control. Complainants' assertion that “Dr. Hoem's testimony established that Aker has further information it has failed to produce” (Mot. at 6) is incorrect. Complainants insinuate—without actually arguing—that additional discovery may be in the possession of unrelated third parties in Norway. But those third-party Norwegian individuals are not in the Aker Respondents' custody or control. Complainants' own actions show this—they previously informed the Aker Respondents they intended to go through formal international discovery channels to obtain discovery from these very same parties and have forced Respondents to go through formal international discovery channels to seek discovery from similar parties. That Complainants ultimately chose not to undertake the same effort they forced upon Respondents is not a basis for now compelling the Aker Respondents to try to obtain that third-party discovery on Complainants' behalf.

Finally, Complainants' request for discovery from Dr. J. Mitchell Jones—the Aker Respondents' reexamination counsel—fails on both procedural and substantive grounds. Procedurally, Complainants' request should be denied because Complainants ignored Ground

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<sup>3</sup> The “'348 patent” refers to U.S. Patent No. 8,030,348, which is not asserted in this Investigation.

Rule 5(e) and the meet-and-confer requirement regarding their request to compel discovery from Dr. Jones. Substantively, Complainants have failed to demonstrate that Dr. Jones has any information relevant to the issues in this Investigation. Complainants disingenuously attempt to equate Complainants' *prosecution counsel for the Asserted Patents* to Respondents' *reexamination counsel for a non-asserted patent*. Respondents' proper request for discovery from prosecution counsel of the patents-in-suit (relevant to Respondents' inequitable conduct claims) is not analogous to Complainants' improper request for discovery from re-examination counsel of a related, unasserted patent. Complainants' Motion should be denied.

**I. The Aker Respondents Have Already Agreed to Produce Dr. Hoem for Additional Deposition Time.**

Complainants' request for the further deposition of Dr. Hoem is moot because the Aker Respondents have agreed to make him available for additional deposition time. The Aker Respondents did so before Complainants filed their Motion, in an effort to avoid burdening the ALJ with additional and unnecessary motion practice.<sup>4</sup> Complainants nevertheless were intent on filing a motion and did so. Complainants request that the deposition occur at their counsel's offices and at Respondents' expense. But this request is baseless and contrary to Order No. 20. As the ALJ will recall, Respondents moved to compel additional deposition time of Complainants' witnesses due to Complainants' failure to produce hundreds of thousands of pages of e-mail prior to the depositions of Complainants' witnesses. The ALJ granted Respondents' requested depositions but did not order expenses or locations to be shifted. Complainants offer no reason why the ALJ should make a contrary decision in response to their request.

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<sup>4</sup> Ex. B, E-mail from Hertko to Cunningham, dated Sept. 5, 2013 (“[I]n the spirit of cooperation and in the interest of avoiding unnecessary motion practice, the Aker Respondents are willing to make Dr. Hoem available for additional deposition time.”)

Moreover, contrary to Complainants' assertions, Aker's privilege instructions during Dr. Hoem's initial deposition were proper. [REDACTED]

[REDACTED] Complainants' claim that "Aker waived [privilege] by disclosing test results to the PTO" (Mot. at 7.) is based on a flawed premise. The submission of test results to the Patent Office does not constitute a broad "waiver" that applies to all privileged communications or details that relate to those tests.

Indeed, the one and only case to which Complainants cite—*Board of Trustees v. Roche Molecular Systems*, 237 F.R.D. 618 (N.D. Cal. 2006)—is distinguishable in view of both the type of information disclosed and the reason for disclosure. In *Roche*, the disclosures to the Patent Office that triggered the waiver included "details of the legal advice" received from counsel. *Id.* at 620. The district court also acknowledged that the plaintiff submitted privileged information to the Patent Office "to correct *its own failure* to include two of the original co-inventors" on the application for the parent of the asserted patents. *Id.* at 626. The Aker Respondents' disclosures to the Patent Office during the '348 patent reexamination, however, differ significantly from those that triggered a waiver in *Roche*. The Aker Respondents did not submit or disclose any information containing legal advice in any "test results" disclosed to the Patent Office. And unlike the plaintiff in *Roche*, the Aker Respondents submitted information in the reexamination of the '348 patent to correct *Neptune's and Dr. Sampalis's failure* to properly characterize the disclosure of the Beaudoin prior art references—not to supplement any information submitted by, or to correct any mistakes made by, the Aker Respondents.

**II. The Aker Respondents Have Repeatedly Confirmed that There Are No Additional Documents or Test Data Regarding the '348 Reexamination in Their Possession, Custody, or Control.**

As the Aker Respondents have repeatedly and consistently confirmed, they have already produced all test data regarding the reexamination of the '348 patent that is in their possession, custody, and control. To manufacture a dispute, Complainants mischaracterize the deposition testimony of Dr. Hoem as well as Aker's consistent representations that they do not possess or control the discovery that Complainants seek. But the Aker Respondents have no additional documents to produce, and their third-party expert—Dr. van Breemen—has already produced all documents in his possession responsive to Complainants' subpoena. Thus, this issue—like Complainants' request for additional deposition time with Dr. Hoem—is moot.

Contrary to Complainants' assertions, nothing in Dr. Hoem's cited testimony establishes the existence of any withheld documents. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>5</sup> Hoem Dep. Tr. at 168:6-19; 171:16-172:15; 173:16-22.

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