UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AKER BIOMARINE AS and ENZYMOTEC LTD. and ENZYMOTEC USA, INC.
Petitioners

v.

NEPTUNE TECHNOLOGIES AND BIORESSOURCES INC.
Patent Owner

CASE IPR2014-00003[1]
U.S. Patent No. 8,278,351 B2

PATENT OWNER'S RESPONSE TO IPR2014-00556 PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 8,278,351

[1] Case IPR2014-00556 has been joined with this proceeding.

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.120, Patent Owner Neptune Technologies and Bioressources Inc. ("Patent Owner" or "Neptune") Responds to the Petition for *Inter Partes* Review ("Petition") of U.S. Patent No. 8,278,351 ("the '351 Patent") filed by Enzymotec Ltd. and Enzymotec USA, Inc. ("Enzymotec").

On July 9, 2014, the Patent and Trial and Appeal Board ("Board") instituted *inter partes* review of the '351 Patent in IPR2014-00556 based on Enzymotec's Petition, and also granted Enzymotec's motion to join IPR2014-00556 with IPR2014-00003.[2] The Petitioner in IPR2014-00003 is Aker BioMarine AS ("Aker") (Aker and Enzymotec are referred to collectively as "Petitioners"). In IPR2014-00556, the Board instituted trial on the identical alleged grounds of unpatentability previously instituted in IPR2014-00003, and in addition, on the alleged anticipation of claims 2, 3, 25, and 26 by Beaudoin I ("Beaudoin").[3]

Neptune submitted its Patent Owner Response on July 1, 2014 to all grounds then currently instituted in IPR2014-00003. Pursuant to the Board's joinder decision in IPR2014-00556, this Response addresses only Enzymotec's challenge of claims 2, 3, 25, and 25 as inherently anticipated by Beaudoin.[4]

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[2] IPR2014-00556, Paper 18 (hereinafter, "IPR2014-00556 Institution Decision"), Paper 19 (hereinafter, "Joinder Decision").

[3] IPR2014-00556 Institution Decision, p. 22.

[4] Joinder Decision, p. 6.

Enzymotec's evidence falls far short of the high bar for inherent anticipation. In most cases, the alleged Beaudoin "recreation" extracts came nowhere close to meeting the limitations of the claims. The data therefore refute the notion that the claimed limitations are "necessarily present" in the prior art extracts. Enzymotec also cannot selectively discard the unfavorable test results based on the species of krill used for extraction. It is undisputed that neither the claims nor the prior art are limited to, or distinguish between, particular species of krill. In addition, even if one attempts to isolate the recreation test results by species, the evidence still fails to prove inherency.

Patent Owner therefore respectfully submits that the Board should uphold the patentability of claims 2, 3, 25, and 26 as novel over Beaudoin.[5]

II. LEGAL STANDARDS

Anticipation requires that a single prior art reference disclose each and every limitation, either expressly or inherently. *ArcelorMittal France v. AK Steel Corp*., 700 F.3d 1314, 1322 (Fed. Cir. 2012) (internal quotation omitted). Anticipation by inherent disclosure requires proof that the missing descriptive material is "necessarily present, not merely probably or possibly present, in the prior art." *Trintec Indus., Inc. v. Top-U.S.A. Corp.*, 295 F.3d 1292, 1295 (Fed. Cir. 2002) (internal quotations omitted). The fact that a certain thing

[5] The Background and Claim Construction sections of Neptune's July 1, 2014 Patent Owner Response are hereby incorporated by reference. *See* IPR2014-00003, Paper 66 (hereinafter, "July 1, 2014 Patent Owner Resp."), pp. 2-7, 9-14.

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