

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioner

v.

NEPTUNE TECHNOLOGIES AND BIORESSOURCES, INC.
Patent Owner

Case IPR2014-00003¹
Patent 8,278,351 B1

**PETITIONER'S REPLY IN SUPPORT OF
MOTION FOR ADDITIONAL DISCOVERY**

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Alexandria, VA 22313-1450**

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

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I. PO Offers No Valid Basis For Refusing Production

A. Confidentiality Is No Basis For PO To Withhold Its Documents

PO continues to oppose discovery because its documents are confidential, but does not dispute that confidentiality is not a valid basis for opposing discovery. The AIA, IPR rules, and protective order PO drafted specifically contemplate discovery of confidential information. *See* 35 U.S.C. § 316(a)(7); 37 C.F.R. 42.54; Paper 60; Ex. 2033. PO does not explain why an exception is justified. Its confidentiality objections should be overruled on this basis alone.

Perhaps seeing the weakness in its confidentiality arguments, PO resorts to misleading claims about the ITC and IPR protective orders. PO states it produced the requested documents as “CBI” “subject to an ITC protective order.” Op. (Paper 83) at 2. But PO does not explain why this matters. It does not. The ITC protective order does not limit Petitioner’s discovery requests in the IPR, or the Board’s authority to grant them, and PO does not argue to the contrary. PO is wrong that “the parties agreed that [the] IPR protective order would cover CBI documents only by mutual agreement.” *Id.* at 4. The order expressly covers ITC documents “that the parties agree in writing, *or the Board authorizes*, may be provided.” Ex. 2033 at ¶6.

PO’s complaints that the requested documents are “voluminous” and may get “into the hands of [Petitioner’s] prosecuting attorneys” are disingenuous. Petitioner offered to use excerpts of the documents and wall off its prosecution counsel; PO did not agree. *See* Ex. 1110. And PO still has not shown why public disclosure of the

documents would harm PO. Stating that the documents concern topics (*e.g.*, “research,” “sales”) does not explain how they could be used to PO’s detriment.²

B. PO Does Not Rebut Satisfaction Of The *Garmin* Standards

PO’s relevance arguments also lack merit. PO cannot reasonably deny that Petitioner will use the documents to rebut PO’s arguments (*i.e.*, that Beaudoin includes a heat step that would destroy all Claimed Phospholipids, and that claims 5 and 28 require 2.5–7.5% free fatty acids because such “low” levels are “consistent with” presence of Claimed Phospholipid). PO does not explain why, if the documents are not relevant, it is so concerned the Board will use them. PO should be ordered to produce the documents so the Board can judge what they prove.

CaPre Email (RX-0456C): PO admits this email shows a study of krill oil stability when exposed to heat. PO claims it nonetheless is not relevant to its arguments that krill oil phospholipids degrade when subjected to heat, because the krill oil involved was not Beaudoin krill oil and might have different “water content” or other characteristics, and the temperature was “below 125°C.” Op. at 5. PO does not say what the temperature was, or how long it was applied, or provide any evidence

² PO’s “tit for tat” theory fails. Petitioner’s rejection of PO’s proposal for blanket use of CBI documents is not inconsistent with its request for specific documents. PO was not “barred” from getting discovery. Op. at 2. It refused to explain how the requested documents were relevant, then abandoned its request for them. *See* Exs. 1111, 1112.

that the alleged distinctions matter. PO's arguments cannot be reconciled with its own reliance on *soybean* oil with undisclosed water content, nor its arguments about what happens to soybean oil at temperatures even below 100° C. Ex. 2059 at ¶18.

Sampalis Deposition Transcript: PO's arguments about the Sampalis transcript are red herrings. Petitioner does not seek to use the Sampalis transcript to show the inventor's "subjective mindset or opinions." Dr. Sampalis is an officer of PO and testified as a corporate designee about the '351 patent. Her admissions are PO's admissions. PO fears the Board might publicly disclose its confidential "sales, distribution chain, and business plan[]" information. Op. at 6. Petitioner does not intend to rely on this information, so this supposed concern is unfounded.

Report on NKO (RX-0398C): PO argues the NKO report is irrelevant because it is not intrinsic evidence. Neither is PO's theory that "a low free fatty acid level [of 2.5–7.5%] is consistent with...recovery of intact phospholipids," however, which is what the NKO report rebuts. Ex. 2059 at ¶37.³

³ PO suggests NKO does not practice claims 5 and 28 as PO interprets them. Op. at 7. If true, this is another reason the Board should reject PO's proposed construction. The '351 patent states that "Neptune Krill Oil" is "the present invention" and discloses no other embodiments. Ex. 1001 at 19:46. A construction that excludes the preferred embodiment is "rarely, if ever correct." *Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298, 1308 (Fed. Cir. 2003).

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