

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RIMFROST AS

Petitioner

v.

AKER BIOMARINE ANTARCTIC AS

PATENT OWNER

Case No.: IPR2018-01179

U.S. Patent 9,375,453

Issue Date: June 28, 2016

Title: Bioeffective Krill Oil Compositions

**PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE
PURSUANT TO 37 C.F.R. § 42.23 (b)**

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I. INTRODUCTION

Patent Owner's Response, Paper 38 ("POR") proffers three meritless arguments why challenged claims 33-61 of U.S. Patent No. 9,375,453 ("the '453 patent") would not have been obvious.

First, ignoring the actual data reported in Example 18, Patent Owner ("PO") erroneously concludes that Extract 2 did not contain any triglycerides.

Second, PO arbitrarily categorizes conventional extraction techniques as either "selective" or "non-selective," and then baselessly contends that a POSITA would not have combined ranges for polar lipids extracted using these so-called different techniques.

Third, PO posits that a POSITA would have been deterred from preparing krill oil having greater than about 3% ether phospholipids because of purported concerns about Platelet Activating Factor ("PAF") activity.

If the *first* and *third* arguments look familiar, they should - - PO proffered these same arguments in one or more of the following "krill IPRs": IPR2018-00295; IPR2017-00746, IPR2017-00745. In fact, the current Response reads as though PO believes that repetition and stridency will overcome the fact that PO had a full and fair opportunity to litigate its "no triglycerides" and "PAF teaching away" arguments. But that each of these arguments was expressly rejected by the

Board as evidenced by the factual findings and conclusions of law detailed in three comprehensive Final Written Decisions finding every claim of U.S. Patent Nos. 9,320,765 (“the ‘765 patent”), 9,029,877 (“the ‘877 patent”) and 9,078,905 (“the ‘905 patent”) unpatentable. *See e.g.*, IPR2018-00295, Final Written Decision (Paper 35) (“-295 FWD”, Exhibit 1129); IPR2017-00746, Final Written Decision (Paper 23) (“-746 FWD”, Exhibit 1104); IPR2017-00745, Final Written Decision (Paper 24) (“-745 FWD”, Exhibit 1103).

The legitimacy of -746 FWD and -745 FWD was even acknowledged by PO’s CEO who candidly admitted:

Early in the process, [PO] became **aware of the weakness in these two patents** and have since upgraded this particular patent family. **The outcome of this [PTAB] hearing was therefore as expected.** However, **we wanted to see how the United States Patent and Trademark Office argued their decisions.** Exhibit 1111, p. 2 (emphasis added).

The Board has already fully considered and expressly rejected two of the arguments PO recycles in an effort to rebut substantial evidence demonstrating that the challenged claims of the ‘453 patent are unpatentable. PO’s remaining argument fares no better. Conventional extraction techniques, regardless of how categorized by PO, could have been predictably modified by a POSITA with a reasonable expectation of obtaining a method of producing polar krill oil as recited

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