

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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RIMFROST AS  
Petitioner,

v.

AKER BIOMARINE ANTARCTIC AS  
Patent Owner.

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Case IPR2018-01730

U.S Patent No. 9,072,752

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**Patent Owner's Sur-Reply to Petitioner's Reply**

Mail Stop Patent Board  
Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

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**I. Collateral Estoppel**

Petitioner argues that collateral estoppel stemming from the final written decisions in IPR2017-00745, IPR2017-00746, and IPR2018-00295 applies to challenged claims 1-20 and that the claims have “materially identical ranges of ether phospholipids, triglycerides and astaxanthin.” Petitioner’s Reply to Patent Owner’s Response (Pet. Reply) at 4-5. For the purposes of this proceeding, Patent Owner will not dispute whether collateral estoppel applies to issues related to the Board’s findings regarding the claims requiring greater than about 5% ether phospholipids. However, Patent Owner specifically notes that the pending and potential appeal of the Final Written Decisions of the identified IPRs may render the collateral estoppel arguments of Petitioner moot and therefore specifically reserves the right to assert and/or appeal the arguments presented in its Patent’s owner Response (“POR,” Paper 13) with respect to those claims.

Patent Owner does not agree that the claims limited to either greater than about 6% ether phospholipids (claims 5 and 15) and greater than about 7% ether phospholipids (claims 6 and 16) are subject to collateral estoppel based on the previous IPR Final Decisions. Specifically, the ‘295 IPR relied on the fact that the 4.8% ether phospholipid content of Catchpole Extract 2 was “adjacent” to the

claimed range of 5 to 8% ether phospholipids. IPR2018-00295, Final Written Decision, (Paper 35)(“-295 FWD”). Under Petitioner’s claim construction, “about greater than 6%” means greater than 5.5% and “about greater than 7%” means greater than 6.5%. Neither of these ranges are adjacent to 4.8%. An ether phospholipid content of 5.5% represents a 12.7% increase over an ether phospholipid content of 4.8% and an ether phospholipid content of 6.5% represents a 26.2% increase over an ether phospholipid content of 4.8%. The issue of whether Catchpole provides the claim limitations of greater than 6% and 7% ether phospholipids was not addressed in the previous IPRs.

## **II. Claims 5 and 6 are not anticipated by Catchpole**

Claims 5 and 6 require greater than about 6% and 7% ether phospholipids, respectively. The Board indicated in the Institution Decision that Petitioner had not established by a preponderance of the evidence that Catchpole anticipates claims 5 and 6. Institution Decision at 6. It is undisputed that the only specific example of a krill oil in Catchpole is in Table 16 which discloses that Extract 2 contains 4.8% ether phospholipids. That is the maximum amount of ether phospholipids in *any* oil or extract described in *any* example in Catchpole. It is also undisputed that the statements in Catchpole that refer to greater than 5% or

10% alkylacylphospholipids refer to generic compositions and not to krill oils as claimed.

Petitioner argues that krill oils containing greater than 5% or 10% ether phospholipids could be obtained by applying the process conditions disclosed in Catchpole. Pet. Reply at 7, 9. At best this is an anticipation by inherency argument. However, the data in Catchpole clearly demonstrates that the various extraction conditions disclosed in Catchpole would not necessarily produce krill oil with the greater than about 6% or 7% ether phospholipids. Specifically, Petitioner argues that Catchpole discloses three marine animals to be used as feed materials for extracting ether phospholipids, Hoki head, green-lipped mussel and krill. *Id.* at 7. Petitioner further argues that “a POSITA desiring an extract with having greater than 10% ether phospholipids, or at least greater than about 6 or 7%, would have selected a marine animal, such as krill, and applied Catchpole’s recited extraction methodology.” *Id.* at 9. According to Petitioner, increasing the solvent concentration to at least 20% will increase the percentage of extracted phospholipids. *Id.* at 8-9.

As a preliminary matter, the “three marine animals” in Catchpole are Hoki head lipid extract (Example 12, Ex. 1009 at 20), green-lipped mussel lipid extract (Example 17, Ex. 1009 at 23), and freeze-dried krill powder (Example 18, Ex.

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