

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UMICORE AG & CO. KG

Petitioner

v.

BASF CORPORATION

Patent Owner

Case IPR2015-01123

U.S. Patent 8,404,203

PETITIONER'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE

Petitioner Umicore respectfully submits this reply in support of its motion to exclude. (Paper No. 40.) BASF's response fails to meaningfully address Umicore's evidentiary objections. Instead, BASF reiterates the same irrelevant substantive arguments, highlighting why that evidence should be excluded.

I. Dr. Tsapatsis Unreasonably Relies on Inadmissible Materials

A. Paragraph 28: According to BASF, Dr. Moini's discussion of zeolite "screening" work is relevant because it was meant to identify materials providing "excellent NO_x conversion over a wide temperature range" and "hydrothermal stability." (BASF Opp., Paper 44 at 3.) But, none of the claims of the '203 patent require these properties. And, as the examples of the patent make clear, the properties are not inherent in the claimed catalysts. The fact that BASF engaged in screening to identify catalysts with unclaimed features is irrelevant and provides no insight into the predictability of the '203 patent's broadly claimed subject matter.

Additionally, BASF has not addressed any of the cases holding that the amount and nature of the work conducted by inventors is irrelevant to patentability. (*See generally* Umicore Motion to Exclude, Paper 40 at 3.) It has also presented no evidence showing that the screening actually constitutes a large amount of work. And, while Umicore elected not to depose Dr. Moini, this does not change the fact that the 2011 Moini declaration was hearsay submitted by an interested party at the time Dr. Tsapatsis relied on it. This is not the type of evidence a

technical expert would reasonably rely on without further inquiry or confirmation.

B. Paragraph 174: BASF misses the point of Umicore’s objections.

The fact that the Dr. Moini obtained the “two examples from Dedecek” from a source different from that mentioned in Dedecek is not what renders his testimony irrelevant. The testimony is irrelevant because the tested catalysts had different starting SARs than those of Dedecek. (*See e.g.*, Ex. 2011 at ¶ 5 (Dedecek’s natural CHA zeolite included 63.89% SiO₂ and 17.48% Al₂O₃—a SAR of 6.2—while Dr. Moini tested natural materials with 64.74% SiO₂ and 21.54% Al₂O₃ before loading—a SAR of 5.1. Dedecek’s synthetic CHA zeolite had a SAR of 5.4, while Dr. Moini tested a synthetic zeolite with 58.47% SiO₂ and 22.16% Al₂O₃—a SAR of 4.5). Further, the testing in paragraph 25 of the Moini declaration is not based on “personal knowledge” because it reports only on testing conducted by an unnamed “colleague,” not Dr. Moini. (*See id.* at ¶ 25.) This is hearsay and BASF has made no attempt to establish that any Rule 803 exceptions apply, or that Dr. Tsapatsis’s reliance on this paragraph was reasonable.

C. Paragraph 48: Umicore objected to Dr. Tsapatsis’s reliance on the Ravindrian declaration because it improperly includes information relayed to Mr. Ravindrian from unidentified individuals at Ford. This is hearsay. And, BASF has not established that any of the hearsay exceptions apply. An expert can rely on otherwise inadmissible materials only “[i]f experts in the particular field would

reasonably rely on those kinds of facts or data in forming an opinion.” Fed. R. Evid. 703. Dr. Tsapatsis made no attempt to ascertain the reliability of Mr. Ravindrian’s statements, and BASF cannot show that technical experts in the field would rely such statements made by an interested party’s employee (Dr. Ravindran’s) about statements made by further unnamed individuals (allegedly at Ford). Thus, it was not reasonable for Dr. Tsapatsis to rely on the evidence.

D. Paragraph 79: BASF does not substantively address Umicore’s objection. As explained, after-the-fact testimony by the author of a prior art reference is irrelevant and can never change what that reference itself discloses to one of ordinary skill in the art. (*See* Umicore Motion, Paper 40 at 6.) Thus, it was improper for Dr. Tsapatsis to rely on the irrelevant Zones declaration.

E. Paragraph 170: BASF does not contest that the Roth declaration includes inadmissible hearsay. (*See* BASF Opp., Paper 44 at 7.) Regardless, BASF argues that it was reasonable for Dr. Tsapatsis to rely on the declaration. As discussed above, an expert’s ability to rely on inadmissible materials is not unfettered. And, BASF provides no explanation as to why it was reasonable for Dr. Tsapatsis to rely on hearsay that Mr. Roth contradicts in the same declaration.

F. Paragraphs 54-55, 62-71, 168-177: In response to Umicore’s objection, BASF simply reiterates the same erroneous arguments it has made repeatedly in this IPR. According to BASF, Umicore’s objections are “essentially

requesting that the Board consider the issue of obviousness of the claimed CuCHA zeolite catalyst without reference to the properties exhibited by the claimed CuCHA catalyst.” (BASF Opp., Paper 44 at 7.) A proper obviousness analysis must focus on what is actually claimed. Here, none of the ’203 patent claims require either “excellent NO_x conversion over a wide temperature range” or “hydrothermal stability.” Moreover, the examples in the specification make clear that an SCR catalyst with a SAR and Cu/Al ratio falling within the claimed ranges does not necessarily provide improved “hydrothermal stability” or other performance benefits. (*See* Umicore Motion to Exclude, Paper 40 at 8-9.) Thus, these properties are not inherent in the claimed subject matter. Accordingly, the properties do not need to be disclosed by the prior art for the ’203 patent claims to be obvious, and paragraphs 54-55, 62-71, and 168-177 are all irrelevant.

G. Paragraphs 147-150: BASF adopts the same erroneous approach utilized by Dr. Tsapatsis. Rather than considering all of Dr. Schuetze’s data, BASF picks and chooses only the data supporting its arguments, including data collected at a subset of the tested temperatures, and only some of the tested SAR values. This was not reasonable and runs afoul of Rule 702.

II. Dr. Moini is Not Qualified To Testify on Customers’ Decision Making

There is no evidence of record that Dr. Moini is qualified to offer the testimony provided in paragraph 11. While Dr. Moini’s technical credentials and

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