

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UMICORE AG & CO. KG,

Petitioner,

v.

BASF CORPORATION

Patent Owner.

IPR2015-01124
U.S. Patent 8,404,203

**PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE**

Patent Owner respectfully submits this opposition to Petitioner's motion to exclude. As explained below, Petitioner's objections on hearsay and relevance grounds are entirely unfounded, and should be rejected. Furthermore, Petitioner's argument that the obviousness analysis in this case should be conducted without recognition of the properties of the claimed CuCHA zeolite catalyst is entirely inconsistent with Federal Circuit precedent. Petitioner's motion to exclude should be denied in its entirety.

I. MOTION TO EXCLUDE PARAGRAPHS OF TSAPATSI'S DECLARATION

A. Tsapatsis Declaration, ¶ 28

Petitioner moves to exclude ¶ 28 of the Tsapatsis Declaration (Ex. 2018), which cites ¶ 4 of the Declaration of Dr. Ahmad Moini (Ex. 2003) from the *inter partes* reexamination history of the 662 Patent. Petitioner incorrectly contends that ¶ 4 of the Moini declaration is irrelevant and that the un-cross examined testimony of Dr. Moini is unreliable.

First, Dr. Tsapatsis cites the Moini declaration to rebut the unsupported assertions by Petitioner's expert, Dr. Lercher, that the technology at issue in this case is predictable, and that it was simply a matter of routine optimization to arrive at the claimed invention. The undisputed fact that the inventors of the 662 Patent performed broad experimentation before arriving at the claimed invention is clearly relevant to whether the technology at issue is complex and unpredictable.

FRE 401. Furthermore, Dr. Tsapatsis' opinion is not based solely on ¶ 4 of the Moini declaration. Instead, Dr. Tsapatsis cites substantial evidence to support his opinion that the relevant technology is complex and unpredictable. *See* Ex. 2018 at ¶¶ 28, 56-75, 151-167, 172.

Petitioner is also wrong that there is no evidence in the record indicating that the screening of 900 zeolite materials and 12 different structure types was directed to problems solved by the 662 Patent. Dr. Moini's declaration explicitly states that the screening was done "to provide a material for selective catalytic reduction that would have two main properties: (1) excellent NOx conversion over a wide temperature range...and (2) hydrothermal stability..." Ex. 2003 at ¶ 3.

Second, Petitioner's argument that the "uncross-examined declaration" is not the type of information on which an expert would ordinarily rely is wholly without merit. There is no rule that an expert can only rely on testimony that has been subject to cross-examination. *See* FRE 703. And even if there were such a requirement, the only reason Dr. Moini was not cross-examined was because Petitioner voluntarily decided not to proceed with the deposition that had been scheduled for April 27, 2016.

B. Tsapatsis Declaration, ¶ 174

Petitioner moves to exclude ¶ 174 of the Tsapatsis Declaration, which cites to the Second Declaration of Dr. Moini (Ex. 2011). This Second Moini declaration

is also part of the 662 reexamination history and includes testimony regarding testing of zeolite catalysts. Petitioner argues that the testing should be disregarded because the natural chabazite samples tested by Dr. Moini were not from the same source as the natural chabazite samples discussed in the Dedecek prior art reference. Petitioner, however, offers no evidentiary rule for excluding either ¶ 174 of the Tsapatsis declaration or the Second Moini declaration. Dr. Moini explicitly noted in his declaration that the natural chabazite discussed in Dedecek was from North Korea, and therefore, not available to him. Ex. 2011 at ¶ 5. He instead utilized a comparable natural chabazite from Bowie, Arizona. *Id.*

Petitioner's expert, Dr. Lercher, and Patent Owner's expert, Dr. Tsapatsis, each reviewed the Second Moini declaration and neither offered any opinion that the testing was insufficient, improper, or otherwise unreliable. Ex. 2018 at ¶ 174; Ex. 2027 at 84:22-25. In fact, Dr. Lercher's 111-page declaration is entirely silent about the testing performed by Dr. Moini. Ex. 1108. Petitioner offers no reasoned explanation for why the use of the sample from Bowie, Arizona renders the testing unreliable.

Petitioner also argues that ¶ 25 of the Second Moini declaration includes hearsay, and on this basis, requests that ¶ 174 of the Tsapatsis declaration be excluded (even though it does not cite ¶ 25 of the Second Moini declaration). In ¶ 25, Dr. Moini explains where certain samples came from, how the samples were

prepared, the parameters of the samples, and the results of the testing. Ex. 2011 at ¶ 25. This is not hearsay, and Petitioner certainly has no argument that Dr. Moini was not competent to testify about these facts based on his personal knowledge. FRE 602. Moreover, even assuming ¶ 25 of the Second Moini declaration includes hearsay, that is not a sufficient basis on which to exclude ¶ 174 of the Tsapatsis Declaration. FRE 703.

C. Tsapatsis Declaration, ¶ 48

Petitioner moves to exclude ¶ 48 of the Tsapatsis declaration because it cites to the Second Ravindran declaration (Ex. 2004), which is part of the 662 *inter partes* reexamination history. The Second Ravindran declaration includes Mr. Ravindran's testimony that BASF sent a sample to Ford, Ford tested the sample, and published the results in a paper (Ex. 2002). As is clear from the declaration, these facts were known to Mr. Ravindran, and Petitioner, having elected not to cross-examine Mr. Ravindran, has no argument that Mr. Ravindran did not have personal knowledge of these facts.

Petitioner also contests the Second Ravindran declaration on the grounds that an email from Ford Motor Company referenced in ¶ 8 of declaration was not attached to the declaration. The omission of this email from the Second Ravindran declaration does not warrant exclusion of ¶ 48 of the Tsapatsis declaration. First, Petitioner has not moved to exclude ¶ 8 of the Ravindran declaration from the

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