

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JOHNSON MATTHEY INC., and JOHNSON MATTHEY PLC,

Petitioners,

v.

BASF CORPORATION,

Patent Owner

Case IPR2015-01266

Patent 9,039,982

PATENT OWNER'S MOTION TO EXCLUDE

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I. PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c), BASF Corporation (“Patent Owner”) respectfully requests that the Patent Trial and Appeal Board (“the Board”) exclude ¶¶ 26-30 of the declaration of David L. Tennent, Ph.D (Ex. 1003) offered by Petitioner. Patent Owner timely objected to this evidence on December 18, 2015. *See* Paper No. 12. Petitioner did not respond to this objection or serve any supplemental evidence purporting to address Patent Owner’s objection.

The opinions in ¶¶ 26-30 of Dr. Tennent’s declaration are unsupported by any facts or evidence, and Dr. Tennent blocked questioning into the underlying facts and data that might support his opinions due to alleged confidentiality concerns. While the lack of supporting data is reason enough to exclude Dr. Tennent’s opinions, his selective use of confidentiality to shield his opinions from effective cross-examination was improper and requires that his opinions be excluded.

II. THE BOARD SHOULD EXCLUDE DR. TENNENT’S TESTIMONY AT ¶¶ 26-30 OF HIS DECLARATION

In ¶¶ 26-30 of his declaration, Dr. Tennent provides his opinion as to certain beliefs allegedly held by the entire automotive industry in the time frame prior to the filing of U.S. Patent No. 9,039,982 (“the ’982 patent”). For instance, Dr. Tennent opines that by 2002 the automotive industry believed that meeting new emissions standards “required putting a very high SCR washcoat loading” onto a

wall flow filter. *See* Ex. 1003 ¶ 26. Likewise, Dr. Tennent opines that during this time frame the automotive industry was engaged in an “intensive effort” to develop a filter that could accommodate higher washcoat loadings. *See id.* ¶ 30; *see also id.* ¶ 29.

Petitioner relies on these opinions to support its contention that, prior to the ’982 patent, the skilled artisan would have been motivated to combine a certain wall-flow filter type with an SCR catalyst coating. *See, e.g.*, Paper No. 1 at 25, 31-32. Indeed, Dr. Tennent testified that he submitted his declaration to “give an opinion on state of the art of filters and the motivation for going to higher-porosity filters in that time period.” Ex. 2026 [Tennent Tr.] at 64:25-65:10; *id.* at 65:21-23 (“I am only giving you the motivation of what was going on at the time.”).

Dr. Tennent, however, fails to cite a single piece of evidence to substantiate his views regarding the beliefs of the automotive industry in the years leading up to the ’982 patent. Dr. Tennent testified that there were countless sources of information regarding the state of the industry during the relevant time frame, including proceedings of scientific meetings, “literally dozens of journals,” email correspondence, marketing literature, academic collaborations, and product literature:

Q. So all of these things that you did to keep informed, the scientific meetings, the dozens of journals, the collaborations,

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