UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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E. I. DU PONT DE NEMOURS AND COMPANY and
ARCHER-DANIELS-MIDLAND COMPANY,
Petitioners,

v.

FURANIX TECHNOLOGIES B.V.,
Patent Owner.

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Case IPR2015-01838
Patent 8,865,921

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PETITIONERS' OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE CERTAIN EVIDENCE

I. INTRODUCTION

Patent Owner's Motion to Exclude Certain Evidence ("Paper 34") largely ignores analyzing or applying the Federal Rules of Evidence ("FRE") to the facts at hand, but simply concludes, mostly without any explanation, that evidence should be excluded either as irrelevant, hearsay, or improper reply evidence.

Patent Owner ignores that the P.T.A.B. has stated: "There is a strong public policy for making all information filed in a non-jury, quasi-judicial administrative proceeding available to the public, especially in an *inter partes* review which determines the patentability of claim in an issued patent. It is within the Board's discretion to assign the appropriate weight to be accorded to evidence." *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, CBM2012-00002, Paper 66, p. 60 (P.T.A.B. Jan. 23, 2014).

The evidence Patent Owner seeks to exclude provides a foundation for Petitioners' expert's testimony or it directly rebuts Patent Owner's arguments. Moreover, because P.T.A.B. has clearly established that a motion to exclude is not the proper vehicle for use by a party to raise the issue of a reply exceeding the proper scope of a reply or reply evidence, this Board should strike or ignore Patent Owner's arguments regarding the proper scope of a reply. Accordingly, Patent Owner's motion should be denied in its entirety.

II. ARGUMENT

a. Evidence Accompanying the Petition

i. Exhibit 1009 (Dr. Martin Declaration)

Patent Owner moves to exclude certain paragraphs of Dr. Martin's original declaration under FRE 402 (relevance) and FRE 403 (confusing, waste of time), simply because the certain paragraphs were not cited explicitly in the Petition. However, Patent Owner ignores that some of the cited paragraphs were properly included in Petitioners' Reply (Paper 29) and also that these paragraphs are relevant to laying foundation for other portions of Dr. Martin's testimony, including the state of the art at the relevant time and the level of skill of a person of ordinary skill in the art. As such, the testimony is relevant. As for Patent Owner's argument that the evidence is either confusing or a waste of time (FRE 403), Patent Owner provides no reasons that the specific information is unduly prejudicial to the fact finder or that the fact finder, i.e., the Board in this case, would find these portions "confusing."

ii. Exhibit 1010 (Prosecution History of EP Application)

Patent Owner objects to Exhibit 1010 under FRE 802 (hearsay) 402 (relevance) and 403 (confusing, waste of time). The only reason Patent Owner provides for its objection is that the document is not prior art to the '921 patent and is not cited in Dr. Martin's declaration. Exhibit 1010 is discussed in the Petition

and is a document produced by another administrative agency addressing the validity of a patent related to the '921 patent. Accordingly, the document is relevant to the proceeding because it addresses the same subject matter—comparing the '921 patent and the '732 publication—and supports Petitioners' argument that the '732 Publication invalidates the '921 patent. The document is not cited as being a ground of rejection and thus it is irrelevant whether the document predates the '921 patent.

iii. Exhibit 1014 (Kreile)

Contrary to Patent Owner's assertion that it was not cited in the Dr. Martin's original declaration, Kreile was cited in footnote 6 of the Petition and lays foundation for the conclusions reached by Lewkowski[1], which cites to Kreile. In addition, Kreile is relevant to the state of the art at the time of Lewkowski's writing and to the level of a person of ordinary skill in the art. "The level of ordinary skill in the art is reflected by the prior art of record." *Fujitsu Semiconductor Ltd., et al. v. Zond*, LLC, Case IPR2014-00781, slip op. at 13 (PTAB Aug. 14, 2015) (Paper 53) (*citing Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001)); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (finding that the Board did not err in concluding that the level of ordinary skill was

[1] Patent Owner did not object to Lewkowski.

best determined by the references of record).

iv. Exhibit 1017 (U.S. Patent 3,071,599)

Exhibit 1017 is cited by Dr. Martin in ¶ 40 of Exhibit 1009 and lays foundation for portions of his testimony in this matter. In addition, Ex. 1017 is relevant to the state of the art and level of a person of ordinary skill in the art at the time of its writing. *See Fujitsu supra*. Therefore, the evidence should not be excluded from this proceeding.

v. Exhibit 1020 (Claude Moreau)

Exhibit 1020 is cited by Dr. Martin in ¶ 46 of Exhibit 1009 and lays foundation for portions of his testimony in this matter. In addition, Ex. 1020 is relevant to the state of the art and level of a person of ordinary skill in the art at the time of its writing. *See Fujitsu supra*. Therefore, the evidence should not be excluded from this proceeding.

b. Post-Institution Evidence

i. Exhibit 1028 (Dr. Martin Declaration # 2)

Patent Owner argues that portions of Dr. Martin's Declaration # 2 should be excluded because it contains improper reply evidence. *See* Paper 34 at 4. It is well established that a motion to exclude is not the proper vehicle to argue that evidence should have been cited in the petition. *See e.g.*, *Liberty Mutual Ins. Co.*, CBM2012-00002, paper 66, p. 62 ("a motion to exclude…is not an opportunity

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