

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

FURANIX TECHNOLOGIES B.V.,
Patent Owner.

Case IPR2015-01838
Patent 8,865,921

**PETITIONERS' RESPONSE TO PATENT OWNER'S MOTION FOR
OBSERVATIONS ON CROSS-EXAMINATION**

I. INTRODUCTION

Pursuant to the Scheduling Order (Paper 11) entered in this proceeding, Petitioners E. I. du Pont de Nemours and Company and Archer-Daniels-Midland Company (collectively “Petitioners”) hereby submit this Response to Patent Owner’s Motion for Observations on Cross-Examination (“Motion” or “Paper 35”).

II. PATENT OWNER’S OBSERVATIONS CONTAIN IMPROPER ARGUMENTS AND SHOULD BE STRICKEN

Petitioners object to Patent Owner’s Motion in its entirety because the “observations contain arguments and are excessively long, and, thus, improper.” *See Medtronic, Inc. v. Nuvasive, Inc.*, No. IPR2013-00506, Paper 37, at 3 (P.T.A.B. Oct. 15, 2014) (“In considering whether a motion for observation, or a response, is improper, the entire motion or response may be dismissed and not considered if there is even one excessively long or argumentative observation or response.”).

As stated in Paper 11, “[t]he observation must be a concise statement of the relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit.” *See* Paper 11, at 5. More importantly, “an observation is not an opportunity to raise new issues, to re-argue issues, or to pursue objections.” *See Medtronic*, No. IPR2013-00506, Paper 37, at 3 (emphasis added). Patent Owner does all three.

Petitioners respectfully submit that at least Patent Owner’s Observations 15, 16, 17, 18, and 20 improperly “raise new issues” not previously presented by

Patent Owner; Observations 7, 10, 11, 16, 18, and 21 improperly “re-argue issues” raised in Patent Owner’s Response; and Observations 1, 2, 3, 8, and 9 improperly “pursue objections” regarding the scope of the Reply Brief and its Exhibits.

Because Patent Owner’s entire Motion for Observations is improper, it should be stricken, dismissed, or simply ignored by the Board in rendering a Final Written Decision in this proceeding. In an abundance of caution, Petitioners provide the following responses.

III. RESPONSES TO OBSERVATIONS

1. Dr. Martin’s testimony in Exh. 1031 at 10:17-11:20 is relevant to his second declaration (Exh. 1028) at ¶¶ 5-7 regarding the disagreement in qualifications and understanding of a person having ordinary skill in the art. *See* Exh. 2003 ¶ 44; *see also* Exh. 2020 at 18:6-14; 78:11-14. This testimony is relevant to Petitioners’ Reply (Paper 29) at 2, and provides the foundation for responsive examples regarding the differences between Dr. Martin’s and Dr. Schammel’s opinions. Patent Owner makes the argument that the testimony shows that the evidence could have been in the Original Declaration. Of course, whether the testimony could have been offered in the Original Declaration is irrelevant, so long as the testimony is offered to refute or rebut new evidence in the Patent Owner’s Response, which is the case here. *See Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1224 (10th Cir. 2000) (“Where the evidence rebuts new evidence or theories

proffered in the defendant's case-in-chief, that the evidence may have been offered in the plaintiff's case-in-chief does not preclude its admission in rebuttal.”) (citation omitted).

2. Once again, Patent Owner attempts to use the Motion for Observations to pursue an argument regarding the scope of the Reply and the Exhibits cited therein by arguing that the testimony shows that the evidence could have been in the Original Declaration. Of course, whether the testimony could have been offered in the Original Declaration is irrelevant, so long as the testimony is offered to refute or rebut new evidence in the Patent Owner's response, which is the case here. *See Koch supra*.

3. Dr. Martin's testimony in Exh. 1031 at 14:21-15:16 should not be considered because it is irrelevant to whether Dr. Schammel's opinions would or would not have changed based on a disagreement over the level of a person of ordinary skill in the art; what is relevant is that there is a disagreement between the two definitions, and Dr. Martin addressed that difference in his Second Declaration. *See e.g.*, Exh. 1028 at ¶¶ 5-7 (testifying about differences in experience and capabilities between definitions of a person of ordinary skill in the art).

4. In Exh. 1031 at 28:8-13 and 32:2-33:18, Dr. Martin testifies that not only do the staged reactor data of the '732 publication and Partenheimer not have identical conditions, but also that when Partenheimer was published, “he has more

data at hand, and so is able to draw a better conclusion or a different conclusion than he reached before.” This testimony is relevant because it confirms the testimony in Exh. 1028 at ¶¶ 13-17 that the later drafted document would have been more authoritative to a person having ordinary skill in the art regarding conflicting conclusions. This testimony does not contradict prior testimony nor does it reflect any purported unpredictability of increasing temperature of a known reaction within known ranges.

5. Dr. Martin’s testimony in Exh. 1031 at 20:10-23:11 that certain experiments of the ’732 publication “certainly stand for the proposition that a greater reaction time does not always result in a greater yield of FDCA with all the other variables being kept constant,” is irrelevant to the issues in this proceeding because the challenged claims do not recite any limitation relating to reaction time. Moreover, Patent Owner’s attempt to re-argue an argument already raised in its Response should not be considered as Motions for Observations are not to re-argue issues in an attempt to get the last word. In any event, as explained by Dr. Martin and Paper 29 at 3-4, yield is a direct function of at least four known result-effective variables: temperature, pressure, catalyst concentration, and time of reaction. A person of ordinary skill in the art would have been motivated to increase temperature and decrease pressure based on the prior art teachings to achieve higher yields.

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