

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

**PATENT OWNER'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE CERTAIN EVIDENCE**

Patent Owner Furanix Technologies B.V. (“Furanix” or “Patent Owner”) hereby submits this reply brief in support of its Motion to Exclude (PTO Paper No. 34). In their Opposition (PTO Paper No. 38), Petitioners provided no basis to overcome Patent Owner’s objections and reasons set forth to exclude each of the exhibits addressed in the motion. All of that evidence should be excluded.

1. Paragraphs of Dr. Martin’s Original Declaration (Exhibit 1009)

Petitioners did not dispute that paragraphs 18-19, 26, 29, 31, 38-39, 41, 46-48, 50-52, 54-60, 62, 67, 69, 72, 75-76, 78-83, 85, 92-93, and 95 of Exhibit 1009 are not cited or referenced anywhere in their Petition *See* PTO Paper No. 38. Rather, without naming a specific paragraph, Petitioners merely assert that “some” of the above paragraphs were properly included in Petitioners’ Reply (PTO Paper No. 29) and that “these paragraphs” are relevant to laying a foundation for Dr. Martin’s testimony on the state of the art at the relevant time and the level of skill of a person of ordinary skill in the art. *See id.* at 2.

Dr. Martin’s proffered definition of a person of ordinary skill in the art does not refer to any of the above paragraphs or their supposed relation to the state of the art at the relevant time or the level of skill of such a person. *See* Exhibit 1009 at paragraph 14. Petitioners’ mere arguments, untethered to any specific paragraph, do not render any of the above paragraphs relevant. All of the above

paragraphs from Exhibit 1009 should be excluded at least because they lack relevance to the issues presented in this IPR under Fed. R. Evid. 402.

2. Exhibit 1010 (Prosecution History of EP Application 2 486 028)

Petitioners argue that the prosecution history of this EP application is relevant to this IPR because it involves another administrative agency looking at the validity of a “related” patent to the ‘921 patent at issue here, relative to the prior art ‘732 publication. *See* PTO Paper No. 38 at 2-3. Petitioners ignore that the EPO application has different claims and the EPO applies different law. Moreover, other than a passing attorney argument, Petitioners did not fully explain the purported relevance of this lengthy EPO prosecution history. This document is not even cited or discussed in the first Declaration of Dr. Kevin J. Martin (Exhibit 1009) or Declaration #2 of Dr. Kevin J. Martin (Exhibit 1028). For all these reasons, Exhibit 1010 should be excluded at least because it lacks relevance to this IPR proceeding under Fed. R. Evid. 402.

3. Exhibit 1014 (Kreile et al. and translation); Exhibit 1017 (U.S. 3,071,599); and Exhibit 1020 (Claude Moreau et al.)

Exhibit 1014 is not cited or discussed in the first Declaration of Dr. Kevin J. Martin (Exhibit 1009), although it is mentioned in a footnote in the Petition (PTO Paper No. 1), and Exhibits 1017 and 1020 are not cited anywhere in the Petition including by reference to the first Declaration of Dr. Kevin J. Martin (Exhibit 1009). Nevertheless, Petitioners assert in their Opposition to the Motion to

Exclude that each of these references is relevant to the state of the art at the relevant time and to the level of skill of a person of ordinary skill in the art. *See* PTO Paper No. 38 at 3-4.

Dr. Martin's proffered definition of a person of ordinary skill in the art does not refer to any of these three references or their supposed relation to the state of the art at the relevant time or the level of skill of such a person. *See* Exhibit 1009 at paragraph 14. Petitioners' mere attorney argument cannot change those facts. Exhibits 1014, 1017 and 1020 should be excluded at least because they lack relevance to the issues presented in this IPR under Fed. R. Evid. 402.

4. Parts of Declaration #2 of Dr. Martin (Exhibit 1028)

Patent Owner moved to exclude parts of Declaration #2 of Dr. Kevin J. Martin (Exhibit 1028) under 37 C.F.R. § 42.23 because the exhibit contains improper reply evidence. In their Opposition, Petitioners argue that 37 C.F.R. § 42.23 should not apply to Declaration #2 of Dr. Kevin J. Martin (Exhibit 1028) that underlies Petitioners' Reply, and that this same section should not be a basis for a motion to exclude. *See* PTO Paper No. 38 at 3-7.

Patent Owner of course does not dispute that it is fully within the Board's discretion to consider and assign the appropriate weight to all of the evidence submitted by both parties to this IPR proceeding, whether or not any objection was lodged. However, Petitioners raised numerous issues in Dr. Martin's Declaration

#2 that were wholly new arguments and not a rebuttal to anything in Patent Owner's Opposition to the Petition or Dr. Schammel's supporting Declaration. These new arguments could have and should have been made with the original Petition. In any case, even taken in its entirety, Dr. Martin's Declaration #2 does not provide any basis to overcome the validity of any claim at issue in the '921 patent.

5. Exhibit 1029 (U.S. Patent No. 8,519,167, "the '167 patent")

Contrary to Petitioners' assertion, Patent Owner did not introduce Exhibit 1029 (the '167 patent) into this IPR proceeding. Dr. Schammel, Patent Owner's expert, merely referenced the '167 patent in his Declaration to disclose the fact that he worked in the past as a consultant for Patent Owner, which resulted in the '167 patent on which he is named an inventor. *See* Exhibit 2003, at paragraph 8. He is not an employee of Patent Owner and does not presently have a consultancy with them (other than in connection with this IPR).

Nevertheless, Petitioners proffered text from the '167 patent as "evidence" based on their own interpretations of same. For all the reasons set forth in the Motion to Exclude, the '167 patent should be excluded at least based on Patent Owner's hearsay and relevance objections.

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