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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARKEMA INC. AND ARKEMA FRANCE
Petitioner

v.

HONEYWELL INTERNATIONAL INC.
Patent Owner

PGR2016-00011
Patent No. 9,157,017

PETITIONER'S MOTION TO EXCLUDE PURSUANT TO BOARD ORDER (PAPER 49)

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Further to its timely objections to preserve its rights (Paper 44) and authorization from the Board (Paper 49), Petitioner moves to exclude Exs. 2165 and 2166. Patent Owner filed this supplemental evidence with its April 17 opposition (Paper 42) to Petitioner's motion to exclude (Paper 36) Ex. 2103—the Thomas declaration filed with Patent Owner's response in December (Paper 24). Although Patent Owner was on notice that Arkema timely objected to Ex. 2103 "as inadmissible hearsay (*see* FRE 801 and 802), that does not fall under any exceptions, including FRE 803, 804, 805, and 807" and reserved its right to depose Dr. Thomas (Paper 25 at 16-17), Honeywell did not submit its supplemental evidence until more than three months later and then without leave from the Board. Exs. 2165 and 2166 should be excluded, if not outright expunged.

I. Exs. 2165 and 2166 Are Untimely and Unauthorized Supplemental Evidence

Honeywell's declarants do not rely on Exs. 2165 and 2166; and on the May 1 call with the Board, Honeywell represented that it filed Exs. 2165 and 2166 only to address Arkema's arguments regarding the admissibility of Ex. 2103. As such, Exs. 2165 and 2166 can *only* be supplemental evidence. IPR2015-00690, Paper 28 at 5-6 ("Supplemental evidence, served in response to an evidentiary objection, is offered solely to support admissibility of the originally filed evidence and to defeat a motion to exclude that evidence, and not to support any argument

on the merits . . . .").

That supplemental evidence, however, was not timely served as required by 37 C.F.R. § 42.64(b)(2). It was over 3 months late. Honeywell asserted for the first time on that call that it was not restricted by that timeframe because Arkema's objections were not "sufficiently particularized." This is not true. Arkema's objections make clear that Ex. 2103 is hearsay and that it "reserves its right to cross-examine" Dr. Thomas. Paper 25 at 16-17 (citing Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48761 (Aug. 14, 2012)); *see also* IPR2014-01156, Paper 36 at 25-26 (concluding declaration in IPR is not hearsay because it is direct testimony subject to cross-examination). Because Honeywell maintains that Ex. 2103 is not hearsay based on Exs. 2165 and 2166, Honeywell could and should have served them in response to Arkema's original objection to Ex. 2103, when discovery was still ongoing. This is irrespective of Honeywell's later refusal to make Dr. Thomas (the apparent author of Ex. 2103) available for deposition to justify late supplemental evidence. Or, had Honeywell believed that Arkema's hearsay objection in Paper 25 was deficient, it could have challenged the propriety of Arkema's motion to exclude long before the May 1 call. It did not.

Moreover, even if such supplemental evidence was timely served, Honeywell did not seek authorization to *file* Exs. 2165 and 2166, denying Arkema the requisite notice the Board's rules and procedures ensure. IPR2016-01249,

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