

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ARKEMA AND ARKEMA FRANCE  
Petitioner,  
v.

HONEYWELL INTERNATIONAL INC.,  
Patent Owner.

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Case No.: PGR2016-00011  
Patent No.: 9,157,017

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**PATENT OWNER'S OPPOSITION TO PETITIONER'S  
MOTION TO EXCLUDE UNDER 37 C.F.R. § 42.64(C)**

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## I. HONEYWELL TIMELY SUBMITTED EXHIBITS 2165 AND 2166

Arkema's primary objection with Exs. 2165 and 2166 is that they were not served until Honeywell filed its opposition to Arkema's motion to exclude, which under Arkema's reading of the rules is untimely. But Arkema neglects to mention that its original objections were not particular at all, depriving Honeywell of the required notice as to what Arkema was actually objecting. *See HTC Corp. v. Adv. Audio Dev., LLC*, IPR2014-01156, Paper 36 at 26 (Dec. 29, 2015) (concluding general objection that document was not "within the business record exception" was "insufficient to put [Petitioner] on notice that [Patent Owner] was specifically objecting to the copyright data of the reference as hearsay") (citing 37 C.F.R. § 42.64(b)(1)). Rather, Honeywell timely served Exs. 2165 and 2166 ten business days after Arkema first particularized its objection to Ex. 2103 in its Motion to Exclude. Paper 42; Paper 36; 37 C.F.R. § 42.64(b)(1).

**Initially**, Arkema's only objection to Ex. 2103 stated:

**Exhibits 2101, 2102, and 2103**

Arkema objects to Exhibits 2101, 2102, and 2103 as inadmissible hearsay (*see* FRE 801 and 802), that does not fall under any exceptions, including FRE 803, 804, 805, and 807.

Paper 25 at 16. That boilerplate objection does not convey Arkema's objection with "sufficient particularity" and thus does not make clear what evidence could correct one of any number of unidentified alleged issues with Ex. 2103. *B/E Aerospace, Inc. v. Mag Aerospace Indus., LLC*, IPR2014-01513, Paper 104 at 7-8

(Mar. 18, 2016) (holding “boilerplate” objections ineffective). Arkema’s further statement in its objections that it “reserve[d] [the] right to cross-examine [Mr.] Winick and Dr. Thomas,” is not even an objection—it is a mere reservation of right—and says nothing to tie Arkema’s lack of cross-examination to its generic hearsay objection. Paper 25 at 16-17.

**Over a month later**, Arkema emailed asking to depose Dr. Thomas. Ex. 1187. That email cannot be an objection as it is not filed with the Board. 37 C.F.R. § 42.64(b)(1)(“objection... must be filed”). Even assuming it is an objection—it is not—there was no basis to assume it was related to Arkema’s previous objection. To be clear, the requested deposition is not routine discovery as Dr. Thomas did not submit a declaration in this proceeding. 37 C.F.R. § 42.51(b)(1)(ii). Arkema could have, but chose not to, request the deposition as additional discovery.

**Finally**, for the very first time, in its motion to exclude, Arkema arguably particularized its claim that Ex. 2103 was hearsay *because* Arkema did not have an opportunity to cross Dr. Thomas. Paper 36 at 8-10. Honeywell timely responded thereafter. Paper 42 (citing Exs. 2165 and 2166); *see* 37 C.F.R. § 42.64(b)(2).

## **II. HONEYWELL HAD AUTHORITY TO FILE EXHIBITS 2165 & 2166**

Arkema next objects, in its motion, that even if Exs. 2165 and 2166 were timely served—they were—then they should be expunged because Honeywell did not request authorization to file them. Paper 50 at 2-3.

Arkema’s cited cases are inapposite. In *Taiwan Semiconductor Mfg. Co. v. Godo Kaisha IP Bridge 1*, the Board merely articulated the standard procedure of serving—but not filing—supplemental evidence in response to an objection. Authorization to file supplemental evidence was not addressed. IPR2016-01249, Paper 12 (Jan. 20, 2017) at 2-4. In *Symantec Corp. v. Finjan, Inc.*, the Board denied a request to serve additional supplemental evidence in response to a party’s “*initial*” objections when the party had already served a “*first set*” of supplemental evidence. IPR2015-01892, Paper 23 at 2-3 (May 24, 2016).

Unlike *Symantec*, where the objections had clearly been made with particularity—as the party had *already* served supplemental evidence—here Honeywell contemporaneously served and filed its supplemental evidence with its opposition to Arkema’s motion to exclude—the first time Arkema made particular objections—and need not have sought authorization. 37 C.F.R. § 42.64(b)(2).

### **III. EXHIBITS 2165 AND 2166 ARE RELEVANT**

Arkema argues that Exs. 2165 and 2166 are irrelevant because they are not relied upon in Honeywell’s substantive papers nor do they support the admissibility of Ex. 2103. Paper 50 at 3. Supplemental evidence is not used to support an argument on the merits. *See Handi-Quilter, Inc. v. Bernina Int’l AG*, IPR2013-00364, Paper 30 at 2-3 (June 12, 2014) (“Supplemental *information*, on the other hand, is evidence a party intends to support an argument on the merits.”)

(emphasis original). Exs. 2165 and 2166 do support the admissibility of Ex. 2103.

Arkema contends Ex. 2103 is hearsay, in part because Arkema was allegedly “deprived . . . of the opportunity to cross-examine [Dr. Thomas] regarding the basis for [his] opinions.” Paper 36 at 9. Not true. Arkema asked for a deposition which was not authorized under the rules. 37 C.F.R. § 42.51(b)(1)(ii). Arkema could have moved for additional discovery. 37 C.F.R. § 42.51(b)(2)(i). Arkema made a strategic choice not to and now is asking the Board to alleviate its mistake.

Exs. 2165 and 2166 were submitted to rebut Arkema’s claim, first made in its motion to exclude, that it was deprived cross-examination. Paper 42 at 11-12. Exhibit 2165 is Dr. Rajiv Singh’s sworn declaration addressing the same stability testing data on which Dr. Thomas based his opinion. *Compare* Ex. 2103 at 6-7, 53-54, *with*, Ex. 2165 at 4-5, 6. And Ex. 2166 excerpts Arkema’s cross-examination of Dr. Singh on that data. Ex. 2166 at 2. That Arkema switched counsel is of no moment. Arkema’s cross-examination of a Honeywell witness under oath on the same stability data in Ex. 2103 shows circumstantial guarantees of that data’s trustworthiness and that Arkema would suffer no prejudice from its admission. Exs. 2165 and 2166 are thus relevant as supporting the admissibility of Ex. 2103. And Exs. 2165 and 2166 are not hearsay as Honeywell does not rely on their truth.

Date: May 9, 2017

Respectfully submitted,

/s/ Gregg F. LoCascio, P.C.

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