

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AFTON CHEMICAL CORPORATION

Petitioner

v.

INFINEUM INTERNATIONAL LIMITED

Patent Owner

Case IPR2017-01321

U.S. Patent No. 8,076,274

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**PATENT OWNER'S OPPOSITION TO  
PETITIONER'S MOTION TO EXCLUDE**

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Patent Owner Infineum International Ltd. (“Infineum” or “Patent Owner”) respectfully submits the following opposition to the motion to exclude filed by Petitioner Afton Chemical Corp. (“Afton” or “Petitioner”). (See Paper 36.) None of the exhibits discussed in Afton’s motion to amend can be excluded.

Afton first discusses Exhibits 2014, 2017, 2018, 2019, 2020, and 2024. These exhibits all relate to the composition of Irganox L 57, a component used by certain of the Colclough reference’s examples. Afton—not Infineum—bears the burden of showing that Colclough expressly or inherently discloses everything that the ’274 patent’s claims require. According to Afton, these exhibits are irrelevant because they are dated after the 2006 filing date of the ’274 patent. But, post-filing documents can be used to establish the state of the art as of the date of a patent’s filing. This is exactly why Patent Owner does here: it cites Exhibits 2014, 2017, 2018, 2019, 2020, and 2024 to show what one of ordinary skill in the art would understand the composition of Irganox L 57 to be at the time the ’274 patent was filed.

Afton next moves to exclude unspecified portions of Exhibit 2025, an expert declaration submitted by Infineum’s expert Dr. Emert. According to Afton, this exhibit is “unreliable” because it references the same Irganox L 57 documents that Afton now wants to exclude, and makes a purported calculation error. But, the Irganox L 57 documents are all admissible. Thus, there is no reason why Dr.

Emert cannot cite to and rely on these exhibits. Further, with respect to Dr. Emert's calculations, Afton has not introduced any expert testimony explaining why Dr. Emert's erred. Instead, it relies solely on attorney argument. And, that attorney argument misapprehends what Dr. Emert is saying. When reviewed in its entirety, there is nothing unreliable about Dr. Emert's testimony.

Afton also asks the Board to exclude Exhibits 2037, a declaration signed by an Infineum patent counsel, and 2038, a cover email and attached draft of the application that led to the '274 patent. According to Afton, these exhibits are inadmissible because they are redacted and incomplete. But, Infineum produced the entirety of the declaration and draft application without redaction. And, while limited attorney/client privileged information was removed from the body of the cover email, this redacted information is irrelevant to this proceeding. Infineum only relies on Exhibit 2038 to show that the invention of the '274 patent was conceived and reduced to practice prior to the filing of one of the patents identified in Afton's motion to amend opposition. The visible portions of Ex. 2038, including the date, time, and recipient list on the cover, and the complete application that spans the remainder of the exhibit, show that it was.

**I. Exhibits 2014, 2017, 2018, and 2024**

Again, Afton first moves to exclude Exhibits 2014, 2017, 2018, and 2024. (See Paper 36 at 3-4.) These exhibits are material safety data sheets ("MSDS") for

Irganox L 57, an antioxidant employed by certain of the examples set forth in the Colclough reference. According to Afton, all of these exhibits are “irrelevant” because they are dated after the effective filing date of Infineum’s ’274 patent. (*See id.*) Afton is wrong.

Afton’s petition argues that Colclough anticipates claims 1-11 of the ’274 patent. (*See* Paper 1, Petition at 26-34.) Afton, not Infineum, bears the burden to show that Colclough either expressly or inherently discloses every limitation required by the claims. In an effort to show that Colclough includes the “antioxidant component ... selected from one or more ash-free aminic and/or sulfur-free phenolic compounds in an amount of at least 0.6 mass % up to 3.0 mass %” required by the ’274 patent, Afton points to Colclough’s use of “an alkylated diphenylamine antioxidant, commercially available as Irganox L-57 from Ciba-Geigy.” (*Id.* at 27 (citing Ex. 1007, Colclough at 7:5).) Infineum cited Exhibits 2014, 2017, 2018, and 2024 to show that, as of the ’274 patent’s filing date, one of ordinary skill in the art would have understood that Irganox L 57 is not necessarily composed of 100% aminic antioxidant, but instead may include as little as 60% antioxidant. (*See, e.g.*, Paper 16, Response at 22-24.) Thus, these documents are highly pertinent to—and serve to rebut—Afton’s allegations regarding Colclough.

Afton is correct that Exhibits 2014, 2017, 2018, and 2024 bear dates that are later than the ’274 patent’s 2006 filing date. This alone, however, does not render

them irrelevant. Indeed, the Federal Circuit has repeatedly explained that “later” published documents can be used “as evidence of the state of the art existing” as of the filing date of a patent-at-issue. *Plant Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1344 (Fed. Cir. 2003); *see also Bd. Of Trust. Leland Stanford Jr. Univ. V. Chinese Univ. of Hong Kong*, 860 F.3d 1367, 1378 (Fed. Cir. 2017) (explaining that the patent office should consider “post-filing date publications” that “contain art-related facts” relating to the meaning of a term used in a patent specification); *Amgen Inc. v. Sanofi*, 872 F.3d 1367, 1375-76 (Fed. Cir. 2017) (explaining that while “post-priority-date evidence” cannot be introduced to “illuminate the post-priority-date state of the art,” it can be used to show the state of the art at and prior to the time of filing); *Gould v. Quigg*, 822 F.2d 1074, 1078 (Fed. Cir. 1987) (holding that a technical article, published after the filing date, can be considered as “evidence of the level of ordinary skill in the art at the time of the application and as evidence that the disclosed device would have been operative”); *Thomas & Betts Corp. v. Litton Sys. Inc.*, 720 F.2d 1572, 1581 (Fed. Cir. 1983) (explaining that later documents “though not technically prior art,” may properly be used “as indicators of the level of ordinary skill in the art to which the invention pertained.”); *In re Hogan*, 559 F.2d 595, 605 (CCPA 1977) (noting that “later publications” can be used “as evidence of the state of the art existing on the filing date of an application”).

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