

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAYER CROPSCIENCE LP
Petitioner

v.

SYNGENTA LIMITED
Patent Owner.

Case IPR2017-01332
Patent 8,404,618 B2

**PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO
PETITIONER'S REQUEST FOR REHEARING**

I. THE ONLY BASIS FOR DENIAL IS MOOT, AND ADOPTING A NEW RATIONALE WOULD DENY BAYER DUE PROCESS.

The Board should institute trial because Syngenta has now conceded that a post-filing reference can indeed be used to show the state of the art (Opp. 3),¹ thereby mooting the *sole* reason the Board denied institution, *i.e.*, that “Exhibit 1025 does not qualify as prior art.” Dec. 10. This concession confirms that it was an abuse of discretion for the Board to deny institution based on an “erroneous view of the law” espoused in Syngenta’s POPR. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (equating abuse of discretion with legal error). Bayer’s Due Process rights would be violated if the Board affirms denial by adopting a different rationale on rehearing (newly raised in Syngenta’s opposition), from which Petitioner has no right or ability to seek correction from the Board. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136 (2016) (“constitutional questions” not barred from judicial review).

II. BAYER DID NOT NEWLY RELY ON INHERENCY.

Bayer’s new case law citations on rehearing were necessitated solely by the Decision’s legal error (at 9-10) in denying institution because “Exhibit 1025 does

¹“Patent Owner acknowledges that a post-filing date reference may be used to show the state of the art and knowledge of one skilled in the art at the time the application was filed.” Opp. 3.

not qualify as prior art.” There is no “inherency” argument in Bayer’s rehearing request for either Ground 1 or 2. To the contrary, in its request, Bayer explained that the structure of KIH-485 is *not* an inherent “property” “flowing from” anything, but rather, that KIH-485’s chemical “structure is its identity, not merely one of its properties.” Req. 8 (quoting *In re Crush*). Syngenta does not even mention *Crush*, much less distinguish it. Moreover, the holding in *In re Wilson* does not restrict use of post-filing references only to show *inherency* as Syngenta alleges (Opp. 4). See MPEP § 2124 (discussing many permissible uses). Just as the Board permitted in *Manoj* (or *Desai*), Bayer used Exhibit 1025 to show that KIH-485 in Polge was, in fact, pyroxasulfone having a chemical structure covered by every claim of the ‘618 patent. Syngenta never rebutted this fact, and even admitted it.² Syngenta’s temporal distinction of *Manoj* (Opp. 6) is meritless, and in any case, the “Steele” reference cited by Syngenta’s expert (Ex. 2001, 6) discloses the chemical name for KIH-485 and was submitted to the journal in February 2005 (before the ’618 patent’s PCT date). None of Syngenta’s new factual issues were decided in the Decision, and are better resolved in trial.

² “Claim 9 corresponds to the structure of KIH-485 which the industry now knows is pyroxasulfone.” POPR 3.

Despite Syngenta's view that the holding in *Wilson* applies only to show inherency, which requires no recognition by a person of ordinary skill, Syngenta takes the inconsistent position that post-filing references can be used to show only that a POSA *knew* a fact at the time. This is contradicted by *Crish*. Syngenta also misapplies *Hogan*. Opp 5. *Hogan* holds that later publications may be used as evidence of art existing on the filing date of an application. *Hogan* only prohibited later evidence about "amorphous polymers which [polymers] did not exist on the filing date." Because KIH-485 indisputably did exist as of the filing date (even if its structure was not known at the time), Exhibit 1025 is properly used, making this case directly analogous to *Crish*. A prior art reference need not use the same terms as the patent claim *in haec verba* for §102. The "[t]he invention is not the language of the [claim] but the subject matter thereby defined." *Teva Pharm. Indus., Ltd. v. AstraZeneca Pharm., LP*, 661 F.3d 1378, 1383 (Fed. Cir. 2011).

III. SYNGENTA'S NEW ARGUMENT THAT POLGE IS NOT ENABLED IS UNTIMELY AND INCORRECT.

Syngenta's *new* arguments that **i)** Exhibit 1025 cannot be used for enablement of the anticipatory reference; **ii)** Polge is not enabled; and **iii)** Exhibit 1025 is not authenticated or is otherwise deficient, are untimely and incorrect. Opp. 6-7, 3. These arguments are incorrect because **i)** Polge is a U.S. patent and is presumed enabled (*Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1355 (Fed. Cir. 2003)); **ii)** Syngenta, not Bayer, has the burden of persuasion to show non-

enablement of an anticipatory reference (IPR2014-00599, Paper 72, 28-29 (“we place the ultimate burden of proving non-enablement on the patentee”); and **iii**) Exhibit 1025 is corroborated by expert testimony and Syngenta’s own admissions in its POPR (at 3). None of these issues were decided in the Decision; trial should be held to resolve them in the first instance.

The allegation that Exhibit 1025 was somehow used to enable Polge is untrue. Polge is presumptively enabled, even for its unclaimed disclosures. *See Amgen*, 314 F.3d at 1355. Moreover, Polge’s invention is not KIH-485 as a *new chemical entity* requiring disclosure of how to make it, as Syngenta misconstrues, but rather is a combination of *known* elements in the prior art: KIH-485, oil, and safener. No knowledge of the structure of KIH-485 was needed to enable a POSA to physically mix these components as Polge teaches. Polge—with *no connection* to Kumiai—knew to include the pre-emergent herbicide called KIH-485 for combination with oil and a safener more than a year before the 2005 PCT date of the ‘618 patent. It is undisputed that numerous university researchers possessed and evaluated KIH-485 in the field and freely published their results since 2003. Req. 6 & n.2. These researchers (POSAs) had physical possession of KIH-485 and could have mixed it with oil and a safener as claimed in the ’618 patent. No more is needed for enablement of Polge. That Polge mis-named KIH-485 an “acetamide” is also immaterial, as it was known to the university researchers to be an herbicide, and

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