UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Bayer Cropscience LP

Petitioner

v.

Syngenta Limited and Syngenta Crop Protection LLC

Patent Owners

Case No. IPR2017-01332

U.S. Patent No. 8,404,618

PATENT OWNER'S OPPOSITION TO REQUEST FOR REHEARING

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I. INTRODUCTION

The Board's decision denying institution of *inter partes* review of U.S. Patent No. 8,404,618 ("the '618 patent") was correct and not an abuse of its discretion. Petitioner bore the burden of proving the challenged claims were unpatentable and failed to do so. Further, Petitioner's new arguments, presented for the first time in its Request for Rehearing, are improper and still fail to show that any challenged claim is unpatentable.

Contrary to Petitioner's assertions, the Board did not misapprehend or overlook Petitioner's arguments regarding KIH-485's identity or Takahashi. Rather, Petitioner did not present these arguments until its Request for Rehearing. The Board should not consider these new arguments, but even if the Board were to do so, the arguments fail because Petitioner cannot establish that pyroxasulfone was known as of the filing date of the '618 patent. And Petitioner's new Takahashi grounds were considered and rejected by the Examiner, who found specifically that Takahashi teaches away from using a safener. The Examiner's findings were correct, and the Board should use its discretion to reject these new grounds under 35 U.S.C. § 325(d) as a waste of the Board's and of the Patent Owner's time and resources.

For at least these reasons, the Board should deny Petitioner's Request for Rehearing.

II. PETITIONER'S ARGUMENT REGARDING THE IDENTITY OF KIH-485 IS NEW AND FAILS IN ANY EVENT

A. Petitioner improperly introduced a new inherency argument in its Request for Rehearing

In a Request for Rehearing, Petitioner must "specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." 37 C.F.R. § 42.71(d). The Petitioner cannot do so here because Petitioner's inherency argument is new. The term "inherent" or "inherency" was never used in the petition, and Petitioner's declarant Dr. Owen offers no testimony regarding what might have been inherent in relation to KIH-485 as of the filing date. Tellingly, Petitioner did not cite any of *Wilson*, *Ex Parte Desai*,[1] *Hogan*, or *Schering* in its petition. To inject arguments of inherency now when they were not previously included is improper. The Request for Rehearing should be denied for at least this reason.

B. Petitioner's newly-cited case law does not support institution

Petitioner argues that as of the filing date, KIH-485 was pyroxasulfone and that KIH-485 thus necessarily had the structure claimed in the '618 patent. But Petitioner has not offered any evidence to support that argument. A code name like

[1] The case cited by Petitioner as "*Ex parte Manoj*" is actually "*Ex parte Desai*" (Manoj C. Desai is the first named inventor). *See* U.S. Application No. 12/528,185.

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