

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SYNGENTA CROP PROTECTION AG,
Petitioner,

v.

FMC CORPORATION,
Patent Owner.

PGR2020-00028
Patent 10,294,202 B2

Record of Oral Hearing
Held: June 16, 2021

Before SUSAN L. C. MITCHELL, ZHENYU YANG, and
CYNTHIA M. HARDMAN, *Administrative Patent Judges*.

PGR2020-00028
Patent 10,294,202 B2

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ON BEHALF OF THE APPELLANT:

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The above-entitled matter came on for hearing on Wednesday, June 16, 2021, commencing at 1:00 p.m. EDT, by Webex.

1 PROCEEDINGS

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3 JUDGE HARDMAN: Good afternoon, everyone. I am Judge
4 Hardman, and with me are Judges Mitchell and Yang. This is the final oral
5 hearing in PGR2020-00028. The Petitioner is Syngenta Crop Protection
6 AG. The Patent Owner is FMC Corporation. We have a court reporter
7 present on the line, and the Board will issue a transcript for this hearing,
8 which will be made part of the record in due course. Let's begin by taking
9 appearances. Counsel for Petitioner, please introduce yourself and your
10 team and identify who will be speaking today.

11 MR. ANDERSON: Good afternoon, Your Honor. This is Michael
12 Anderson, from Baker Hostetler. I'm here on behalf of Petitioner Syngenta
13 Crop Protection AG. And with me today are my colleagues, Toni-Junell
14 Herbert and Fabian Koenigbauer. I will be speaking during the presentation.

15 JUDGE HARDMAN: Thank you, Mr. Anderson. And, Counsel for
16 Patent Owner, please introduce yourself and your team and let us know who
17 will be speaking.

18 MS. MORRISON: Good afternoon, Your Honor. This is Susan
19 Morrison, from Fish and Richardson, on behalf of Patent Owner FMC
20 Corporation. With me today are my colleagues, Dorothy Whelan and
21 Deanna Reichel. And I will be speaking on behalf of Patent Owner today.

22 JUDGE HARDMAN: Thank you, Counsel. And thank you all for
23 your flexibility, in participating in this all-video hearing. And as a reminder,
24 if you encounter technical difficulties during the hearing, please immediately
25 speak up or contact the team member who provided you with the connection
26 information. And if you come to a good-faith belief that the pace of this

1 hearing is preventing you from adequately representing your client, please
2 also let us know. We'll consider some expansion of the allotted time. Now,
3 we understand that Petitioner has filed two Motions to Exclude, and we do
4 not expect to rule on those Motions today, but the parties are welcome, but
5 not obligated, to argue those Motions, during your allotted time. And we
6 will address them in our final written decision.

7 Now, each side has 60 minutes to present its case, and we will do our
8 best to keep track of time, but we also suggest that you and your colleagues
9 do the same. Petitioner will present its arguments first. And, Mr. Anderson,
10 would you like to reserve any time for rebuttal?

11 MR. ANDERSON: Yes, Your Honor. I'd like to reserve 10 minutes,
12 if I could?

13 JUDGE HARDMAN: And, Counsel for Patent Owner, you may have
14 the last word today, if you wish. Would you like to reserve any of your
15 time?

16 MS. MORRISON: Yes, I'd like to reserve 10 minutes, as well.
17 Thank you.

18 JUDGE HARDMAN: Okay. As a reminder, please identify yourself
19 each time you speak and mute your microphone when not speaking. The
20 panel has access to the entire record, including your demonstratives. And
21 please refer to each demonstrative paper or exhibit by the appropriate
22 designation, and just give us a second or two to call up the paper or exhibit
23 that you're referring to. And our expectation is that, unless absolutely
24 necessary, counsel for the opposing party will not interrupt the other party's
25 presentation. So, with that, we are ready to begin. If you bear with me, I
26 will set the clock for 50 minutes. And, Mr. Anderson, you may begin.

1 MR. ANDERSON: Thank you, Your Honor. Again, this is Michael
2 Anderson. Good afternoon. May it please the Board, I am here speaking
3 today on behalf of the Petitioner, Syngenta Crop Protection AG. We have
4 prepared some demonstrative slides of -- can that be -- if the Board is
5 willing, I can put those on the screen, as a share. I will do that now. So,
6 those should be on the screen. Please let me know if they are not.

7 JUDGE HARDMAN: We do see them. Thank you.

8 MR. ANDERSON: Okay. So, today, we have organized the -- our
9 argument into four pieces. The first piece is going to be the lack of
10 enablement argument. Then, we'll move to the insufficiency of the written
11 description. Then, we'll move to the Petitioner's arguments, related to Dr.
12 Hunt's patents, which are our first Motion to Exclude. And, finally, we will
13 briefly touch on the Motion to Exclude certain opinions from the Patent
14 Owner's expert, Dr. Dayan.

15 We'll begin with the lack of enablement arguments, which was
16 ground 1 to the petition, and that pertains to claims 1 through 3, 9 through
17 13, and 21 through 30. Now, Section 112 of the Patent Act makes it clear
18 that the specification of the patent must make -- it must enable a person of
19 ordinary skill in the art to make and use the claimed invention. Well, that
20 general principle is undisputed here. The parties have spent a lot of time
21 debating how this requirement is actually applied in practice. And the focus
22 of my discussion today is going to be on the use aspect of the make and use
23 prong of Section 112.

24 I think the first issue that's really the subject of dispute is exactly what
25 must be enabled. We think it's important to note that it's not sufficient
26 under the law to merely enable a few embodiments. The patent must enable

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