

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMONWEALTH SCIENTIFIC INDUSTRIAL AND
RESEARCH ORGANISATION,
Petitioner,

v.

BASF PLANT SCIENCE GMBH,
Patent Owner.

PGR2020-00033
Patent 10,301,638 B2

Record of Oral Hearing
Held: June 14, 2021

Before ULRIKE W. JENKS, JO-ANNE M. KOKOSKI, and
JEFFREY W. ABRAHAM, *Administrative Patent Judges*.

PGR2020-00033
Patent 10,301,638 B2

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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ON BEHALF OF THE PATENT OWNER:

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The above-entitled matter came on for hearing on Monday, June 14, 2021, commencing at 1:01 p.m., EDT, at the U.S. Patent and Trademark Office, by video/by telephone.

P R O C E E D I N G S

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2 JUDGE KOKOSKI: Good afternoon. Today we will hear
3 arguments in PGR2020-00033 concerning U.S. patent No.
4 10,301,638. I am Judge Kokoski and I am joined today by Judge
5 Jenks and Judge Abraham. Let's start with appearances,
6 beginning with Petitioner.

7 MR. GERSHIK: Hello, Your Honors, My name is Gary
8 Gershik. I'm here on behalf of Petitioner Commonwealth
9 Scientific Industrial and Research Organisation of Australia,
10 CSIRO for short.

11 JUDGE KOKOSKI: Okay. Thank you. Patent Owner.

12 MR. IZRAELOWICZ: This is Mark Izraelewicz from the
13 firm Marshall, Gerstein & Borun. I'm here for the Patent Owner
14 BASF Plant Science GMBH and with me as well on the Webex is
15 Sandip Patel, lead counsel in this PGR, with my firm as well.

16 JUDGE KOKOSKI: Okay. Thank you. Consistent with
17 our Hearing Order each party has 60 minutes to present their
18 arguments. Petitioner will proceed first and may reserve time for
19 rebuttal. Petitioner, how much time would you like to reserve
20 for your rebuttal?

21 MR. GERSHIK: I'll reserve 20 minutes.

22 JUDGE KOKOSKI: Twenty minutes.

23 MR. GERSHIK: Thank you.

24 JUDGE KOKOSKI: Okay. Patent Owner will then have 60

1 minutes to present their case and may reserve time for
2 surrebuttal. How much time would you like to reserve for the
3 surrebuttal?

4 MR. IZRAELEWICZ: Ten minutes, Your Honor.

5 JUDGE KOKOSKI: Ten? Okay.

6 MR. IZRAELEWICZ: Yes, Your Honor.

7 JUDGE KOKOSKI: Okay. Thank you. Before we begin
8 I'd just like to remind the parties that we each have a copy of
9 your demonstratives and during your argument please identify
10 clearly and specifically the demonstrative referenced by slide or
11 screen number so that everyone can follow along and to ensure
12 clarity and accuracy of the court reporter's transcript. We
13 request that you keep your line muted when you're not speaking.
14 Also please keep in mind that the remote nature of this hearing
15 may result in audio lags so please pause prior to speaking so as
16 to avoid speaking over others.

17 I'll also remind the parties that this hearing is open to the
18 public and we do have an audio line open to the public today,
19 therefore the parties should avoid disclosing any confidential
20 information during their arguments. We will keep track of time
21 and try to give you a reminder close to the end but we encourage
22 you to also keep track of your own time. Okay. With that, let
23 me just get the clock started, and Petitioner you can begin when
24 you're ready.

25 MR. GERSHIK: Thank you, Your Honors. We're

1 discussing U.S. patent 10,301,638, the '638 patent for short.
2 This patent has issued with 23 claims. We submitted a petition
3 seeking this PGR along with declaration of Dr. Yadav pointing
4 out numerous issues with all of the claims. The Patent Owner
5 BASF had a chance to rebut this evidence after the PGR was
6 instituted and BASF has chosen to rebut only the evidence
7 insofar as it applies to claims 9 and 10. Claim 9 is one of two
8 independent claims and claim 10 depends on claim 9. Thus, our
9 evidence on 21 of the 23 claims is unrebutted on this record.

10 Even with respect to claims 9 and 10 we had a chance to
11 cross-examine BASF's expert and that testimony resulted in
12 additional evidence that could point to invalidity of claims 9 and
13 10. In short, we believe that CSIRO has the preponderance of
14 the evidence of invalidity for lack of enablement and lack of
15 description of all of the claims in this '638 patent.

16 I'm going to get to specifics now and I want to start with
17 slide 3. Slide 3 has the two independent claims, claim 1 and
18 claim 9. Claim 9 is being defended by Patent Owner, claim 1 is
19 not. Claim 9 is directed to oils, lipids and/or fatty acids
20 produced by a transgenic *Brassica* plant, has to be a transgenic
21 *Brassica* plant wherein said oils, lipids and/or fatty acids
22 comprise a total amount of at least 54 percent by weight of
23 polyunsaturated Omega-3 fatty acids based on the total fatty
24 acids in the transgenic plant.

25 Maybe I will quickly just jump to slide 10 just to

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