

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SYNAFFIX B.V.,
Petitioner,

v.

HANGZHOU DAC BIOTECH CO., LTD.,
Patent Owner.

IPR2022-01531
Patent No 10,131,682

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Board’s May 12, 2025 Order (EX3006), Patent Owner moves to exclude Exhibits 1089 and 1090 and related deposition testimony of Dr. Lawrence Nathan Tumey (EX1091 at 26:3-37:5) as (1) untimely and improper under the Board’s April 4, 2025 Order (Paper 40), 37 C.F.R. § 42.23(b), and the Consolidated Trial Practice Guide (Nov. 2019) (“CTPG”); and (2) not relevant and unfairly prejudicial under Federal Rule of Evidence 403. Patent Owner objected to Exhibits 1089 and 1090 and related deposition testimony during and after Petitioner’s deposition of Dr. Tumey on May 9, 2025. *See, e.g.*, EX1091 at 27:22-28:7, 32:14-19; EX3006 (parties’ joint email).

II. ARGUMENT

A. Exhibits 1089 and 1090 Are Untimely and Improper

Petitioner untimely and improperly filed new Exhibits 1089 and 1090 with Petitioner’s Sur-Sur-Reply (Paper 48), in violation of the Board’s Rules and the April 4, 2025 Order.

It is not appropriate for Petitioner to introduce new exhibits at this stage. The Board’s April 4, 2025 Order is unambiguous: the Board authorized Petitioner to file a sur-sur-reply but “*not [to] introduce new evidence* other than the deposition transcript of Patent Owner’s declarant.” Paper 40 at 3-4 (emphasis added). Petitioner filed two new exhibits with its Sur-Sur-Reply, which contravenes the

Board’s express instruction.

Additionally, 37 C.F.R. § 42.23(b) and the CTPG explicitly state that a sur-reply—the last brief filed in an IPR—“*may not be accompanied by new evidence* other than deposition transcripts of the cross-examination of any reply witness.” 37 C.F.R. § 42.23(b) (emphasis added), CTPG at 73-74 (emphasis added); *see, e.g., Netflix, Inc. v. DivX, LLC*, IPR2020-00511, Paper 46 at 54 (granting motion to exclude exhibits first introduced in expert deposition and submitted with a sur-reply, because “Rule 42.23(b) provides a blanket prohibition on . . . filing exhibits with a sur-reply” “other than deposition transcripts of the cross-examination of any reply witness”); *Intel Corp. v. ParkerVision, Inc.*, IPR2020-01265, Paper 44 at 74 (same).

Furthermore, introducing evidence at this late stage is unfair and prejudicial to Patent Owner, because Patent Owner will not have an opportunity to address the new exhibits in further briefing. *See, e.g., Intel*, IPR2020-01265, Paper 44 at 74 (granting motion to exclude an exhibit first introduced in expert deposition and filed with a sur-reply, noting that the movant “would undoubtedly be prejudiced by the admission of [the exhibit] . . . because [the movant] lacks an opportunity to respond to new evidence submitted with a sur-reply”).

Petitioner attempts to circumvent the Board’s April 4, 2025 Order and Rules by introducing new evidence now, with its Sur-Sur-Reply. The Board authorized the Sur-Sur-Reply on the condition that it be limited to the scope of Dr. Tumey’s

second declaration (EX2047), which itself had a limited scope.

Not only does Petitioner submit new evidence, it also relies on that evidence to present new arguments. In its Sur-Sur-Reply, Petitioner belatedly presents a new theory as to why the claim term “Y” should not be construed in accordance with its plain meaning to be a functional group that independently enables reaction with a cell-binding agent. It argues that the art—as purportedly evidenced by its new exhibits and the related deposition testimony—teaches that an exemplary Y group enables “acid-catalyzed” reactions. Sur-Sur-Reply at 4-5. But the phrase “acid-catalyzed” does not appear *anywhere* in Exhibit 1089. After a limited review of Exhibit 1089 during deposition, Dr. Tumey stated that “I’m not comfortable with your question because you’re implying that there is a catalyst present here, and I do not see one.” EX1091 at 27:14-18, 31:15-17. Moreover, Exhibit 1090 is not prior art as discussed below, and thus is irrelevant for that reason alone.

Accordingly, Petitioner attempts to rely on Exhibits 1089 and 1090 and Dr. Tumey’s related deposition testimony to present new arguments that are not included in its Petition or Reply, nor supported by the new evidence, and beyond the scope of Patent Owner’s Sur-Reply, which cites Dr. Tumey’s second declaration only for Ground 1 to address Dondoni (EX1064), a new exhibit Petitioner filed with its Reply. *See* Paper 44 at 12 n.4. Notably, Dondoni does not include *any* reference to any “acid-catalyzed” reaction. Requiring Patent Owner to address acid-catalyzed

reactions at an oral hearing without the benefit of briefing to explain Petitioner's misleading new arguments will prejudice Patent Owner.

Because Exhibits 1089 and 1090 and the related deposition testimony are new evidence untimely and improperly submitted along with Petitioner's Sur-Sur-Reply, they should be excluded.

B. Exhibits 1089 and 1090 and Related Deposition Testimony Should Be Excluded Under FRE 403

Exhibits 1089 and 1090 and related deposition testimony should be excluded because they are not relevant and any probative value is substantially outweighed by unfair prejudice under FRE 403.

First, Exhibit 1090 has a priority filing date of March 29, 2018, over five years after the November 24, 2012 priority date of the '682 patent, and Exhibit 1090 was published on October 3, 2019, almost seven years after the priority date of the '682 patent. Exhibit 1090, accordingly, is not prior art. Nevertheless, Petitioner attempts to rely on Exhibit 1090 to show the state of "the art." Sur-Sur-Reply at 5 (supporting statements such as "the art expressly teaches . . ." and "the art likewise confirms . . ." with Exhibit 1090). Exhibit 1090 is not prior art, and it should be excluded from the Board's patentability analysis for that reason alone.

Second, Petitioner cites to portions of Exhibit 1090 that were not even discussed during Dr. Tumey's deposition. *Compare* Sur-Sur-Reply at 2 (citing

EX1090, ¶ 136), 5 (citing EX1090, ¶ 102), *with* EX1091 at 33:13-37:5 (discussing only EX1090, ¶¶ 132, 133, 163).

Third, Dr. Tumey did not consider or rely on either exhibit when preparing his declarations, he is not an author of the references, and he was shown the references for the first time at his deposition. When Dr. Tumey was shown the exhibits at his deposition, he was placed in the untenable position of having to review over 100 pages of highly technical material—a 6-page technical document (Exhibit 1089) and a 95-page patent publication (Exhibit 1090)—within an objectively short timeframe that precluded any meaningful or comprehensive understanding of their contents. *See, e.g.*, EX1091 at 27:14-18 (Dr. Tumey stating with regard to Exhibit 1089, “I will remind you I have, of course, not read the entire article here”); *id.* at 34:4-7 (Dr. Tumey stating with regard to Exhibit 1090, “I’m not sure what I can do here in five minutes . . . this is a 95-page document”); *id.* at 34:8-9 (Petitioner’s Counsel stating with regard to Exhibit 1090, “I understand . . . it is a very lengthy document with a lot of detail”).

Finally, Dr. Tumey’s testimony regarding Exhibits 1089 and 1090 is limited to agreeing with Petitioner’s Counsel’s verbatim recitation of the exhibits’ language. *See, e.g.*, EX1091 at 26:17-30:12 (“A. That is what it is depicting, yes.”); *id.* at 33:13-37:5 (“A. I see that, yes. . . . That is what they state, yes.”). Exhibits 1089 and 1090 are also not relevant for reasons stated above (*see supra* at pp. 3-4).

Accordingly, the new exhibits are not relevant to issues in the case and do not provide context for Dr. Tumey's deposition testimony. *See Netflix*, IPR2020-00511, Paper 46 at 55 ("We disagree that the exhibits provide context for Dr. McDaniel's deposition testimony because Dr. McDaniel repeatedly testified that he had not seen the exhibits."). Given the lack of relevance of Exhibits 1089 and 1090 and Patent Owner's inability to respond to the new evidence, allowing Petitioner to submit and rely on the exhibits would be unfairly prejudicial to Patent Owner for the reasons discussed above, and any purported relevance would be substantially outweighed by the unfair prejudice. Accordingly, Exhibits 1089 and 1090 and Dr. Tumey's related testimony (EX1091 at 26:3-37:5) should also be excluded under FRE 403.

III. CONCLUSION

Patent Owner respectfully requests that the Board exclude Exhibits 1089 and 1090 and related deposition testimony (EX1091 at 26:3-37:5).

Date: May 19, 2025

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CERTIFICATE OF LENGTH (37 C.F. R. § 42.24)

The undersigned hereby certifies that the foregoing document has six (6) pages and thus complies with the applicable page limit.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served in its entirety on May 19, 2025 upon the following parties via Electronic Mail:

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