UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VANTAGE SPECIAL CHEMICALS, INC, PETITIONER, vs CARGILL, INC, PATENT OWNER.	Case No IPR2023-00589 US Patent No 11,248,245

Telephone Conference

January 16, 2024
11:00 a.m.

Telephone Conference, before Marina Radinovskiy, a Notary Public of the State of New York.

A P P E A R A N C E S (Telephonically):

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A P P E A R A N C E S (Continued):

ALSO PRESENT:

Judge Timothy Majors

Judge Sinead (phonetic)

Daniel Enebo - Cargill Esq.

Cass Dottridge - Cargill Representative

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JUDGE MAJORS: This is a conference call that was requested by Patent Owner in IPR2023-00589. Could I please have introductions by counsel that will be presenting today.

MR. KANE: Good morning, Your Honor. This is Michael Kane from Fish and Richardson, and I will be presenting on behalf of the Patent Owner, Cargill.

MR. LUCAS: Good morning, Your Honor. This is Eric Lucas from Shearman and Sterling, the counsel for Petitioner, Vantage.

JUDGE MAJORS: Okay, welcome. Welcome to others on the line, as well. For the sake of moving things forward, why don't we go ahead and get going.

Patent Owner, as I understand, you requested the call, so I will let you start. You can present and then Petitioner will have a chance to

respond.

MR. KANE: Thank you, Your Honors, and good morning.

Your Honor, we are here this morning regarding the scope of the deposition of Patent Owners declarant, Mr. Curry. To the extent, the Petitioner's ground -- to set the context here, Petitioner's grounds are based, in part, on references describing prior art commercial products, for example, Cummings Exhibit 1004. Petitioner's expert, Dr. Rockstraw, attempts to use these descriptions of these commercial products in support of his opinions. But his PO -- or his expert, Dr. Schultz, opined, in support of the PO PR, OPOSA (phonetic) would know the information about manufacturing processes such as yield and post-transesterification processing would impact the properties of commercial products and

that Dr. Rockstraw did not take that into account in reaching his conclusions.

In the Patent Owner response, Patent Owner submitted three exhibits that demonstrate that, in fact, the commercial Jojoba products from the relevant time period, 20, 25 years ago, did undergo post-transesterification processing that did impact properties of the final commercial products, and these are Exhibits 2012 and 2013, which are lot records of individual batches, dated 2004. And Exhibit 2014, which is a standard Manufacturing Process document, which describes steps in the manufacturing process dated in 1998.

Now, Mr. Curry submitted a two-page Declaration -- literally four substantive paragraphs in this declaration -- under FRE 902(11) to support Patent Owner's position that

these are Self Authenticating business records. Dr. Schultz, then, relied upon these exhibits to reinforce his opinion that a person of skill would understand that commercial Jojoba products would undergo post-transesterification processing that would change the properties of the commercial product in Paragraph 141 of the Declaration he submitted in support of the Patent Owner's response.

The Petitioner objects to these exhibits. Presumably, the Petitioner plans to file a motion to exclude and wants to take Mr. Curry's deposition in support of that motion.

And just to be clear here, for the record, Your Honors, if the Petitioner does file such a motion to exclude, Patent Owner reserves the right to argue that other provisions in the Federal Rules of Evidence, including 806, 807, 901 and 902 would

support admission of these exhibits, but that's not the issue here today, obviously.

Just a bit more background here, is that the parties are also involved in a parallel District Court litigation. Mr. Curry was deposed in that litigation on a variety of topics that are not relevant to the litigation here. And the concern is that the Petitioner intends to go far outside of the RPR litigation, the two-page Declaration, to authenticate these documents and into litigation issues which are not subject to the Declaration.

As your Honors, I'm sure, are well aware, 37CFR42.53 states that cross-examination is limited to the scope of the direct testimony in this proceeding. Arguably, this 902(11) Declaration is not even direct testimony under the Federal Rules, but, nonetheless, we have offered to

make Mr. Curry available for a deposition concerning the statements made in the Declaration about the three exhibits in the dispute.

Given the extremely narrow scope of the Declaration, we suggested a one to two-hour remote deposition. The Petitioner, however, did not agree to that. They wanted an in-person deposition with no time limits, you know, just here, at the eleventh hour, as we were sending an e-mail to the Board. The Petitioner did agree to limit the questioning to three hours, so, at least, we are moving in a direction we think is the way that it should go, given the very, very, narrow scope of this Declaration submitted by Mr. Curry in this proceeding.

Again, the concern here is that the Petitioner's actions strongly suggests that he intends to go far outside of the Declaration and

the exhibits in attempt to delve into litigation topics and other issues or matters that are outside of the scope.

The Patent Owner believes the Petitioner should be limited to questions relevant to the Declaration and any potential motion to exclude. Therefore, Patent Owner requests that given this very limited scope of Mr. Curry's two-page Declaration, the deposition be limited to two hours, and we also request that the Petitioner be limited to questioning Mr. Curry about statements in the Declaration pursuant to 37 CFR 42.53 as the Board stated in other matters, a question is properly within the scope if it has sufficient underline basis as a statement made by the Declarant in the Declaration.

So one straight forward way to keep us within the scope as this deposition goes forward would be to

limit the proper scope to questions about the Declaration and the three exhibits in the Declaration, and that should avoid, hopefully, us getting outside of the proper scope and leading to any further disputes, Your Honor.

JUDGE MAJORS: Just to summarize, Patent Owner's request is that the deposition of Mr. Curry be limited to two hours and the questioning be limited to the Declaration and the three exhibits mentioned in the Declaration.

MR. KANE: And remote.

JUDGE MAJORS: Go ahead, Mr. Kane.

MR. KANE: Your Honor, we believe given the very limited scope and the probably two hours or three hours deposition here is more practical and more cost affective, but that's probably less important than making sure that we limit the

scope here as required under the rules.

JUDGE MAJORS: Okay. Mr. Lucas, whenever you're ready.

MR. LUCAS: Good morning, Your Honors.

With respect to the length of time and the location, I don't think the Patent Owner should have included those two issues. We've already told counsel for the Patent Owners that we would agree to a three-hour deposition, even though under the rules we would be given more than that by default. It is a short Declaration and I told counsel that we would likely keep it short and then I committed to a three-hour deposition, if they would accept that, and they didn't. So I don't think that issue should be on the table.

And, then, we've also offered to fly, on our own dime, to a

convenient location for Mr. Curry, and, so, I would submit that there is very little inconvenience for him given our willingness to do that.

We simply want to cross-examine Mr. Curry to test his credibility and the veracity of the testimony of the documentations submitted in his Declaration.

The disagreements are very narrow. We are, of course, going to limit the questioning to the scope of direct testimony pursuant to the rules. But to test the truth and credibility, I might have to go outside of the four documents that patent Owner is talking about and they want to confine us to those four documents and statements made inside of the Declaration, which, presumably, would prevent me from asking any questions relating to credibility. I don't think that we have to agree to that upfront. I

think the rules provide ample protection for Patent Owner to object to the deposition if things are getting too far afield. And my intention is to not do that, but I don't want to commit to something that I don't have to upfront. So I think it's a very simple issue, Your Honor, and we would respectfully seek your guidance on that.

JUDGE MAJORS: Mr. Kane, I will give you a couple of minutes to respond, if you'd like.

MR. KANE: Your Honor, I guess, the concern we have, is we have had this discussion with opposing counsel and this concept of credibility is so nebulous, I don't know what that means, Your Honor.

We've asked for some examples as to what documents or topics that counsel believes would be fair game at this deposition, under this nebulous term, credibility, and we

have not gotten any response, and so that's what's leading to our concerns here.

And, again, it's in the context of a very, very, narrow Declaration just authenticating these documents and with full knowledge that there was parallel litigation and significant testimony -- a full day of testimony by Mr. Curry given there. So we are just concerned that counsel, in the context of credibility, is going to go far outside of this Declaration and these exhibits and into these other topics that may have come up in the litigation deposition.

JUDGE MAJORS: Okay. This is Judge Majors again. Let me confer with Judge Sinead (phonetic) and then we will try and join you back in just a moment or two.

MR. KANE: Thank you, Your Honor.

(Whereupon, a brief recess was taken.)

JUDGE MAJORS: All right. I've talked to Judge Sinead and we are in agreement. Since there is a court reporter here, the court reporter would just take this down and whoever arranged for the court reporter, please file as an exhibit the transcript, whenever it's ready.

As far as timing for the deposition, two hours sounds reasonable to your judges, and, so, the order is that the deposition of Mr. Curry can be up to two hours. As far as location is concerned, since Petitioner is willing to travel to a convenient location for the witness, we are going to order a live deposition subject to agreement of the parties on the particulars about time and location.

On the question of scope, which is, as I gather, the main

dispute exists, we hear both sides points here and they are both valid. The Declaration is limited. At the same time, it's somewhat difficult to craft an order that restricts the nature of the questioning that Petitioner can ask. We don't necessarily know where the examination is going to go. All that being said, we would unlikely consider testimony that strays materially outside of the scope of this limited Declaration, so I would caution the Petitioner in that respect. This is not an opportunity to gather evidence to be used for purposes of a parallel litigation. But if there are things that bear on the witness' credibility, specifically as to the Declaration, if the witness, for example, doesn't remember certain things or doesn't have a basic knowledge to attest to facts surrounding these documents, at

least, as I understand the parties position, that these are business records, that is something that Petitioner may fairly question.

In addition, do the parties have any sense when this -- it's probably too premature to say -- when this deposition may take place. We can try to arrange to have one or several of the judges on line. If, during the course of the deposition, if things go south and objections are of the sort that the Board needs to get involved, and hopefully that will not be the case, but we can try to have one of us, at least, be available to make a ruling on the spot, if the nature of the questioning goes far outside of the scope of the deposition -- I'm sorry, the Declaration, rather.

MR. KANE: Your Honor, this is Michael Kane. We don't have a time yet for that. Mr. Curry has a very

busy travel schedule at this point, so it will probably be several weeks out. But we appreciate the offer and we will coordinate with Petitioner's counsel and inform the Board so that you can adjust schedules as you are able to and we thank you for that consideration.

JUDGE MAJORS: That's fine. You can send an e-mail to the trials team, just as you do when you make a request for a conference call, just informing the Boards of the time and date and we will do what we can to have somebody be on line.

Sometimes it's difficult to get through quickly to the panel, but we are usually pretty good about doing that. It doesn't come up frequently, I will tell you. And as you can probably imagine, we don't encourage the parties to have to have the Board get involved during the depositions. Most of the time

counsel is able to handle this themselves.

MR. KANE: Thank you, Your Honor. Again, we will definitely try to do that, especially in light of the guidance that the panel was able to give us today.

JUDGE MAJORS: Okay. Mr. Lucas, anything further from you? Does everybody understand the nature of this order?

MR. LUCAS: Yes, Your Honor, I understand the nature of this order. Thank you very much for your time.

One last request while we are here I may as well ask. Patent Owner submitted a proposed Protective Order on Patent Owner's response. Is this something the Board can provide some guidance as to whether that will be officially entered or whether we might treat that as entered already.

JUDGE MAJORS: I will confess, I have not looked at that yet. Is it

just the default Protective Order or is it changed relative to the Board's default?

MR. LUCAS: I believe it's slightly modified from the Board's default but not significantly so. But I do believe there are modifications.

JUDGE MAJORS: The way these work -- I'm sorry, Mr. Kane, were you going to say something?

MR. KANE: I wasn't, Your Honor. I'm sorry. I think there is just some background noise.

JUDGE MAJORS: You probably know, the way these work, is everything remains provisionally sealed up until such time that the Board rules on that. But because I haven't looked at it and because it's not the default, I can't say, sitting here right now, whether it would be something that we would enter.

If the changes are minor,

generally speaking, the Board does grant those requests where the parties agreed to, you know, minor modifications to the default that doesn't involve prosecution bars or things like that. But, again, I don't want to get anybody's expectations up having not looked at that.

MR. LUCAS: Thank you, Your Honor. I appreciate your guidance.

JUDGE MAJORS: Anything further today?

MR. KANE: No, thank you, Your Honor.

MR. LUCAS: Nothing for us. Thank you, Your Honor.

JUDGE MAJORS: Thank you, everyone.

With that the call is adjourned. Enjoy the rest of your day.

MR. KANE: Thank you, Your Honor.

JUDGE MAJORS: All right.

MR. LUCAS: Thank you. You too, Your Honor.

(Time noted: 11:24 a.m.)

C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

I, MARINA RADINOVSKIY, a Notary Public within and for the State of New York, do hereby certify that the within is a true and accurate transcript of the proceedings taken on January 16, 2024.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of January, 2024.

MARINA RADINOVSKIY