

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INARI AGRICULTURE, INC.,
Petitioner,

v.

CORTEVA AGRISCIENCE LLC,
Patent Owner.

IPR2024-01014
Patent 8,901,378 B2

Record of Oral Hearing
Held: August 26, 2025

Before: MICHAEL J. FITZPATRICK, ZHENYU YANG, and
TIMOTHY G. MAJORS, *Administrative Patent Judges*.

APPEARANCES:

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The above-entitled matter came on for hearing on August 26, 2025,
commencing at 12:02 a.m., via video teleconference.

P R O C E E D I N G S

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JUDGE YANG: Good afternoon. This is the hearing for IPR2024-01014 involving Patent Number 8,901,378. I am Judge Yang. Joining me via video are Judge Fitzpatrick and Judge Majors.

Now, Counsel, please introduce yourselves. Let's start with Petitioner.

MR. MCKEOWN: Good morning, Your Honor. Scott McKeown, Wolf, Greenfield & Sacks for Petitioner Inari Agriculture.

JUDGE YANG: Okay. Good. Patent owner? Do we have Counsel for Patent Owner?

MS. SOMMERS: We do. Sorry about that, Your Honor, I was on mute. Good afternoon. I'm Erin Sommers from Finnegan, here on behalf of Patent Owner Corteva Agriscience.

JUDGE YANG: Thank you. And welcome, everyone. Counsel for both sides are seasoned practitioners before the Board, so I will just very quickly run a few basic housekeeping stuff. As we stated in the trial order, each party has 60 minutes to present its argument, starting with Petitioner and followed by Patent Owner. Both parties may –if you want to reserve no more than 20 minutes for rebuttal. This hearing is open to the public, so please do not discuss any confidential information.

The court reporter will provide a transcript of the hearing that will serve as the official record. And to ensure the record -- the transcript is useful later, please clearly identify the record. Just a reminder, we will not consider new argument or new evidence not already in the record, so please

1 do not present them. If you believe opposing counsel is making this mistake
2 and want to object, please do not interrupt the counsel's presentation,
3 instead, wait until it's your turn to argue.

4 We will not be making any patentability determination here on the
5 spot today. So if you can actually point out the other side's offense, we will
6 make sure to disregard those new argument and evidence when we make the
7 final decision. Any questions?

8 MR. MCKEOWN: None from Petitioner, Your Honor.

9 MS. SOMMERS: Patent Owner -- none from Patent Owner.

10 JUDGE YANG: Very good. All right. Petitioner, before you go
11 into your argument, I want to bring to your attention the RPI issue. Patent
12 Owner argued that Inari Agriculture NV should be named as RPI in this
13 proceeding. In your reply, page 13, footnote 2, you said Petitioner Inari
14 Agriculture, Inc., acknowledge its privity with Inari Agriculture NV. So do
15 you plan to update the mandatory notice anytime soon?

16 MR. MCKEOWN: Well, I guess I would seek guidance from
17 Your Honor. We mentioned this relationship (INDISCERNIBLE -
18 TECHNICAL DIFFICULTY).

19 JUDGE YANG: Sorry, there was some interruption with the
20 audio. At least I did not hear what you said.

21 Charles (PHONETIC), I think we are having some issue here.
22 Judge Fitzpatrick, if you are speaking, you are on mute.

23 JUDGE FITZPATRICK: Thank you. Lots of problems here. I
24 was going to ask Mr. McKeown if maybe he had a backup line. Counsel
25 may have a backup line on in the same room, and then they interfere with

1 each other, so one would need to be muted so.

2 MR. MCKEOWN: Any luck now?

3 JUDGE YANG: Yes. I can hear you.

4 MR. MCKEOWN: Okay. You can hear me?

5 JUDGE YANG: Seems like we're fine.

6 MR. MCKEOWN: Okay. Good. Yeah, sorry about that. If the
7 panel believes that an update to the mandatory notice is appropriate, we're
8 happy to do that. I believe the relationship was explained in the petition
9 itself, which is what we were referencing. It's a privity relationship, so we
10 did not put it in the mandatory notices for that reason. And it's not an RPI.

11 JUDGE YANG: All right. We will let you know before the end of
12 the hearing on this issue. Now, coming back to your arguments on the
13 merits, would you like to reserve any time for rebuttal?

14 MR. MCKEOWN: Yes, Your Honor. I'd like to reserve 20
15 minutes.

16 JUDGE YANG: All right. That gives you 40 minutes. I'm setting
17 up timer here. But please, if you can keep a record of your own. And
18 whenever you're ready, please, go ahead.

19 MR. MCKEOWN: Okay. Let me just share the slides here. Let's
20 see, so you should be able to see the slides, if you could just confirm those
21 are up there.

22 JUDGE YANG: Yes.

23 MR. MCKEOWN: Okay. Thank you, Your Honor. I think we've
24 managed to get through all the technical issues. Good afternoon. Scott
25 McKeown again, Wolf, Greenfield & Sacks for Petitioner Inari Agriculture.

1 May it please the Board.

2 This is a rare IPR in which neither the claims nor the prior art need
3 to be discussed in any detail. There's a single dispositive issue here
4 pertaining to the regulations on seed deposits. So that is whether Patent
5 Owner's failure to make a seed deposit in its 2004 grandparent filing can be
6 excused based on commercial availability years after the fact. It cannot.
7 There is no PTO regulation that can overrule the enablement statute to allow
8 for retroactive enablement. And the limited proofs prior to 2004 fail, as we
9 will go through in the slides today.

10 But before we do that, let's jump to Petitioner Slide 2, which is on
11 the screen, just to level set here on what we are talking about, so seed
12 deposit regulations 82 -- 802(b). The idea here is if a biological material is
13 necessary to meet 112 requirements, then that seed must be deposited. And
14 upon deposit, we see on the right-hand side of the slide, all restrictions
15 imposed by the depositor on the availability to the public of that material
16 will be irrevocably removed upon granting of the patent.

17 So that's typically what happens with a seed deposit. The seed is
18 deposited, the public knows where to go, knows what forms to use, knows
19 how to access that seed, has the ability to research that seed to identify the
20 actual 112 support, in this case, the event TC1507. So that's what should
21 have happened in this case. But there's no dispute that the seed was not
22 deposited.

23 And I'll briefly talk on Slides 3 through 5 as to why there needed to
24 be a deposit, but I don't think that's reasonably disputed in the record. So
25 what we're talking about here in the briefing, by and large, you see on the

1 left-hand side of Petitioner Slide 2, we're talking about this exception to seed
2 deposit. The idea that, and it's in that middle of the paragraph there,
3 biological material need not be deposited if it is known and readily available
4 to the public. So I've bolded readily available as that's the primary dispute in
5 the record.

6 But I just want to highlight three things before moving into the
7 arguments, which is the standard itself. First, the standard is known and
8 readily available, neither alone is sufficient. We can't conflate known with
9 readily available. So number one, there needs to be two hurdles cleared
10 here. It has to be known and readily available. Again, I've highlighted --

11 JUDGE YANG: I just want to know, do you dispute that this is
12 -- at this time was known?

13 MR. MCKEOWN: No, we do not. And as I was about to say,
14 that's why I've highlighted readily available in bold. So we're primarily
15 disputing the readily available aspect of the rule. So known by itself is not
16 enough, also needs to be readily available. So that's the first thing to keep in
17 mind. Second thing to keep in mind, readily available is a term of degree.
18 We need factual showings to assess whether a seed is readily available under
19 this standard -- under this standard.

20 So for example, quantity of the seed available, the cost of the seed,
21 the location, geographic location, the acreage, how a member of the public
22 would access that seed, are there restrictions on access to that seed, et cetera.
23 And then thirdly --

24 JUDGE YANG: And where do we look -- Counsel, where do we
25 look for support to this line of argument, including the acreage of planting?

1 MR. MCKEOWN: I'm giving examples, Your Honors. For
2 example, if you go to the MPEP 2404, you'll see explanations of some of the
3 factors that get to this ultimate determination, cost is one of the ones
4 mentioned in there. The standard itself is readily available. So we need to
5 assess what does readily mean in context of availability to the public.

6 So if you go through 2404, and this has been briefed and cited by
7 Petitioner and it's brief, you will see some of those factors, right? It's not
8 enough that a seed is known, it's not enough that it was sold. The question
9 here is can that commercial availability substitute for the seed deposit,
10 which, you know, is an ease of access, it's filling out a form, it's mailing it
11 into an office, it's a relatively low cost, and there are no restrictions on the
12 seed. So those are the many factual determinations that need to be shown
13 here. So --

14 JUDGE YANG: But I thought you -- Petitioner actually argued
15 -- sorry, Patent Owner actually pointed out, even for seed deposit, there
16 would be restrictions.

17 MR. MCKEOWN: That's correct. Our argument -- and so this is
18 an argument the Patent Owner made in their briefing that we're arguing that
19 there needs to be no restrictions. But that's not our argument. Our argument
20 is that if you are going to avail yourself of this exception to the rule, then
21 that showing needs to at least be equivalent to what the public would
22 otherwise enjoy as a consequence of the deposit. So maybe stated a bit
23 simpler, if Patent Owners could avoid the deposit system and just sell their
24 seeds and maintain important elements of legal control without providing the
25 ability to research the seed to actually identify the event, no one would file a

1 seed deposit, right?

2 So this isn't about arguing that there can be no restrictions
3 whatsoever. It's that right, if the exception is to apply, it needs to be of the
4 same scope as the seed deposit itself, which I'll get to in my slides. You'll
5 see the difference in the restrictions on a seed that's deposited as compared
6 to a seed that's sold under private contract.

7 JUDGE YANG: On the identifying the event part, I think your
8 declarants actually discussed that for approved event, it's routinely screened.
9 Would that count as identifying the event?

10 MR. MCKEOWN: No, Your Honor. If you look at that portion of
11 the deposition transcript, the question to the declarant was, was he aware of
12 anyone that did screening? And what he said was, in some export context,
13 the government may do some screening. But the question here is access to
14 the public, not whether there's a government program that does some
15 screening. And even if that were the case, there's no evidence in this record
16 from Patent Owner that that is somehow linked to readily accessible to the
17 -- readily available, excuse me, to the public.

18 So again, just getting back to the standard, there's three things to
19 keep in mind: it's both, it's known, and readily available. It's readily
20 available as a standard of degree -- a term of degree that needs some kind of
21 factual underpinning. And finally, although not on this slide, the MPEP
22 makes clear that this exception, the burden is on the Patent Owner to show
23 these -- to meet these -- meet the standard by clear and convincing evidence.
24 So those are the three things to keep in mind. Actually --

25 JUDGE YANG: So on the clear and convincing evidence

1 standard, MPEP governs the prosecution stage. Does that evidentiary
2 standard have any application here?

3 MR. MCKEOWN: Yes, Your Honor. Because that's the rule that
4 Patent Owner is availing themselves of. I would agree that this should have
5 been done during prosecution, but it wasn't. Certainly, this standard should
6 not get easier after the fact, especially where the Patent Owner has enjoyed
7 maintaining their seed under strict contractual obligations. So the MPEP is
8 certainly very persuasive authority internal to the office and to stray from
9 that standard here in a post grant setting to make it easier only would
10 promote gamesmanship.

11 So again, just before I jump into the evidence, just keep in mind
12 the standard here. It's the Patent Owner's burden of production to meet this
13 showing, and it needs to do so under a clear and convincing evidentiary
14 standard.

15 So moving on, just quickly, very quickly, Slides 3 through 5.
16 Again, I don't think there's a serious dispute here that the seed should have
17 been filed. And so this is just a reminder, this wasn't, you know, the focus of
18 the briefs. But I just want to level set here on why we're talking about the
19 exception.

20 So we have evidence from one -- you know, from those skilled in
21 the art that transgene integration was like throwing a grenade into a, yeah,
22 genome. The '378 Patent itself talks about this random process. The Patent
23 Owner has highlighted this random process in their briefing. All of this was
24 credited at institution. The petition at page 2 has another quote about how
25 controlling the locations of transgene insertions is one of the holy grails of

1 plant biotechnology. So it's pretty compelling stuff, grenades and holy
2 grails.

3 Moving to Petitioner Slide 4, not surprisingly, the Patent Owner
4 agrees. In prosecution at the EPO, they pointed out that reproducing the
5 event is almost impossible without access to the seed. When the examiner
6 and the EPO pointed to paper disclosure that TC1507 existed, they
7 characterized that as mere paper disclosure, that's not enough. When the
8 examiner pointed out that, well, what about the farmers that have the seed in
9 their hand? And again, this is in the 2003 time frame. They argued that
10 important elements of legal control were always retained.

11 You can see the red line at the bottom of Petitioner Slide 4 about
12 the grower was prohibited from doing any research. So again, if we're
13 talking about, you know, readily available, you need to be able to access that
14 germplasm and to analyze the event. So those were the arguments made to
15 the EPO.

16 And then finally, in Slide 5, the EPO did not grant the Patent
17 Owner the TC1507 event because there was no deposit. So again, this
18 wasn't disputed in any great detail, but we have evidence from those of skill
19 in the art. We have the Patent Owner's own admissions and representations
20 to the EPO, all pointing to the fact that this seed should have been deposited
21 to enable this application. And it was not, to the extent there was any real
22 pushback on this idea that the seed should have been deposited. It came
23 early on in the preliminary response.

24 And this is on Petitioner Slide 6. This idea that, well, right, the
25 EPO has some different laws. And, you know, therefore, it was

1 distinguishable. But again, as pointed out correctly at institution, facts are
2 facts, right? The facts surrounding the seed sales and the agreements are the
3 same across (INDISCERNIBLE - TECHNICAL DIFFICULTY).

4 JUDGE FITZPATRICK: Mr. McKeown, I'm going to interrupt
5 you. Your audio returned to the state that it was in the beginning. The last
6 thing we heard was "facts are facts."

7

8 MR. MCKEOWN: How about now? No?

9 JUDGE YANG: Yeah, it works now.

10 MR. MCKEOWN: Oh, hold on. Okay. Can you hear me now?

11 JUDGE FITZPATRICK: Yes.

12 JUDGE YANG: Yes, I can. I stopped the clock. You can get 30
13 seconds afterwards. But do you know what's going on, on your side?

14 MR. MCKEOWN: No, no idea. I keep switching back to different
15 microphones or disengaging for some reason, but --

16 JUDGE YANG: Okay. Well --

17 MR. MCKEOWN: All right. Let me get on track here.

18 JUDGE FITZPATRICK: Mr. McKeown, since we got off -- I had
19 a question, so now would be a good time for it.

20 MR. MCKEOWN: Sure.

21 JUDGE FITZPATRICK: On the clear and convincing standard
22 from the MPEP, have you seen that enforced in a district court litigation
23 where a Patent Owner is trying to rely on commercial availability?

24 MR. MCKEOWN: To my knowledge, I'm not aware it if that's
25 ever happened. This is a very unique scenario.

1 JUDGE FITZPATRICK: Okay. Thank you.

2 MR. MCKEOWN: Sure. All right. Let me try it again.

3 Hopefully, this audio won't keep cutting out. But again, as I mentioned
4 -- we don't need to spend a ton of time on this, but Slide 7 -- excuse me,
5 Slide 6 just points out that there's overwhelming evidence here, whether it's
6 from a person of skill in the art, Patent Owner itself, the patent, the EPO
7 correspondence from the Patent Owner that the seed should have been filed
8 and was not.

9 So with that, let's start moving into Slide Number 8, which are
10 some of the proofs that are discussed in the briefing. So Slide Number 8,
11 you see this argument here at the top of the page that the TC15 event would
12 have been extremely difficult to get in hand, that comes from Petitioner's
13 expert.

14 So first and foremost, there is only one declaration -- one
15 declarant, I should say, in this proceeding. That is the Petitioner. As to the
16 availability of the seed, just in general, whether it was for sales or otherwise,
17 is that it was extremely limited to get in hand.

18 And so just going through the proofs, if we start out with just, well,
19 what about the sales of the seed in the 2003 time frame, we have two
20 problems. Number one, the testimony that it was extremely difficult to get
21 in hand with no countervailing evidence on the other side of anything to the
22 contrary. That's number one. And number two, as we know, because the
23 Patent owner told the EPO this on Slide 4, just because a farmer has the seed
24 in hand because they can't do anything with it, but just looking at it, right,
25 they're not allowed to do any research to actually get into the technology

1 that's claimed that the sale would not satisfy the readily available standard.

2 So two reasons that --

3 JUDGE YANG: So on the cannot -- the farmers cannot do
4 anything on it part, so if the seed, assuming it was deposited, could someone
5 just write to the depository and say, I want to buy some and then take it back
6 and verify the event?

7 MR. MCKEOWN: Yes, Your Honor. And that's on Slide 9,
8 which talks about the difference -- and why don't we just jump there, the
9 difference between the two paths here. So at the bottom is the seed deposit
10 requirement. To the right of the underlying in bold, you'll see research
11 purposes. Above is the contract that is used by Patent Owner. And we've
12 underlined in red, seed production or research, right, to not use this seed for
13 its progeny or provide it to anyone for crop breeding, seed production, or
14 research. So that's the difference between the restrictions.

15 JUDGE YANG: Forgive me, I have no experience in the seed
16 depository area. But I think Exhibit 2007 on page 2, Patent Owner would
17 emphasize -- is it page 2 -- that it is the purchaser's responsibility to obtain
18 license or anything so that you do not violate any IP law related -- do not
19 violate the IP law, patent law here.

20 MR. MCKEOWN: Well, yeah. To be clear, right, going through
21 the seed depositing system doesn't give you the license to do whatever you
22 want with the patent but -- or with the seed, excuse me. But it provides, by
23 its plain terms, the ability to do research.

24 JUDGE YANG: Right.

25 MR. MCKEOWN: And again, this is -- this isn't my argument,

1 right? This is what they told the EPO on Slide 5, right? If you were a
2 farmer and you have the seed and it's subject to the seed seller's contract, it's
3 not publicly accessible because you can't do the things that you need to do to
4 it, such as sequence it or, you know, do the necessary research. That's the
5 Patent Owner's argument.

6 So again, just going back to Slide Number 8. So in order to argue
7 for enablement here, it has to come up one of two ways, right? It was either
8 the sales, which Patent Owner has said are under contractual restriction.
9 Their words were, they retain, you know, important elements of legal
10 control. That's what they told the EPO. So sales can't be readily available.

11 And as I mentioned, it was also extremely difficult to get in hand,
12 as Dr. Silverstone has said. And he's the only witness in the record. So at
13 least as far as sales, that's not a path that will get the path known to
14 enablement. So not surprisingly, they have not argued that in their briefing.

15 We go to Petitioner Slide 10. We can start to get into the argument
16 they made, at least in their principal brief at the top, this argument that there
17 is commodity corn, and just so everyone's on the same page of what I'm
18 talking about. When the seeds are sold in 2003, as represented by Patent
19 Owner, at the end of 2003, at the end of the growing season, that corn goes
20 to market, essentially. So it is sold. And the farmer is the one that signs the
21 contract. So once it's sold, right, the argument then becomes, well, it's out
22 there in the public, and someone could go and do this research that, you
23 know, we don't allow under our own contract.

24 But there's numerous problems with that argument. So first, we'll
25 start with the blurb at the top of Slide Number 10. So what Dr. Silverstone

1 said here is, you know, we're talking about access, right? So he's already
2 testified that the seed was extremely limited. And then right now we're
3 talking about, okay, the extremely limited seed was planted, right? Now,
4 there's a crop. And now, that crop is going to be released into the
5 commodity system.

6 Okay. So, you know, necessarily, the commodity corn available
7 will follow the extremely limited supply of seeds. So that's the first problem
8 with this argument. But that's not the most significant, right? The most
9 significant is, well, okay, you're telling me that there's this small amount of
10 seeds, there are farmers that plant it, it goes to the commodity system. This
11 gets to the known and readily available, right? The factual evidence that is
12 necessary to address that term of degree, under a clear and convincing
13 standard or under a preponderance standard, we would need to know at a
14 minimum, right, how much seed was sold.

15 We've got evidence in the record from one declarant only that says
16 that it was extremely limited, right? What state was it sold in? Was it sold
17 in more than one state? What town? Was it sold in more than one town?
18 What farmers are we talking about? There's no farmers identified in this
19 record. There's no sales invoices. There's no commodity corn brokers
20 identified by name or invoice. There's no explanation as to what the crop
21 yield was in 2003, what the weather was, you know, in that time frame.

22 And again, starting out with an extremely limited amount of seed,
23 right? How many metric tons would the public have to sift through? What
24 state would they go to? What town would they go to? How would they find
25 this event, right? On top of that, as Dr. Silverstone testified, we've got the

1 extremely limited number of seed, we've got all these other factors that we
2 just don't have any information on. And then depending upon the farmer,
3 they may silo it for 3, 6, 9, or 12 months. He's also testified to that, there
4 was nowhere addressed. So we don't know that any seed actually got into
5 the commodity system. And again, this is --

6 JUDGE FITZPATRICK: Mr. McKeown, let me interrupt. You
7 just said a lot of things about what you consider problems for Patent Owner.
8 What differences -- are there any different answers to the questions
9 -- hypothetical questions you just raised? Are there any different answers in
10 2005, for example?

11 MR. MCKEOWN: Well --

12 JUDGE FITZPATRICK: Do you know the acreage, you know,
13 those kinds of things?

14 MR. MCKEOWN: Right. But here's the answer to that. Our
15 position is that by 2006 -- so after 2003, 2004, 2005, that's three growing
16 seasons. So at that point, we've gone from extremely limited seed to over
17 the course of three growing seasons. You could go and have some
18 reasonable expectation of finding the event by screening commodity corn.
19 That has not been challenged by Patent Owner. So the difference is --

20 JUDGE FITZPATRICK: Well, they have challenged -- I mean,
21 they've challenged the first part of it, that it was available in 2003. They're
22 saying it was available both times, right?

23 MR. MCKEOWN: Well, I'm saying they haven't challenged our
24 argument about the three seasons, right? So there was the 2003 growing
25 season, 2004, 2005. Patent Owner is limited to just the 2003 growing season

1 because their date is four months, right, after the end of the --

2 JUDGE FITZPATRICK: Yeah. No. I did -- yeah. And I'll grant
3 you this, that in all likelihood, if this thing's commercially successful or, you
4 know, valuable, you're going to see more of it in American agriculture as
5 time goes on. And therefore, I would find it totally logical that there'll be
6 more of the corn expressing this gene or this event in 2006 than 2003.

7 However, I'm having trouble drawing a line between 2003 and
8 2006 based on vague concepts. And here's the vague concept, you start with
9 a phrase, "extremely limited." There's really no numbers attached to that,
10 it's just a characterization. And then you say, in three years, there would
11 have been harvest, replant, harvest, replant, harvest. And now, there's a
12 whole bunch more. And so it would be easy for the POSITA to find this
13 corn. I need something more concrete, and I'm wondering if you have that.

14 MR. MCKEOWN: Well, just so I'm clear, Your Honor, you need
15 something more concrete on the argument that it was available in 2006?

16 JUDGE FITZPATRICK: Well, I'm not going to play the gotcha
17 game with you. I get your point. I'm not going to say that -- you need to
18 demarcate some sort of significance of three growing seasons. There's no
19 case law. You haven't cited anything about that. So I get that Patent Owner
20 might be in a little conundrum because they want to admit that it was
21 available in 2006 because they want to argue that it was available in 2003.
22 But that's not -- I'm looking for evidence. So I'm wondering what your
23 evidence is that it is available in 2006 but not in 2003.

24 MR. MCKEOWN: Sure, Your Honor. And just to be clear, you
25 know, I'm not trying to respond with gotchas there. There's evidence in the

1 record that over the course of the growing seasons, the amount increased.
2 So there's that. And the only testimony in this record as to what was
3 available in 2003 is from our declarant, which states that it was extremely
4 limited.

5 Now, Patent Owner could have gotten some evidence of their own
6 from their own declarant to argue that it wasn't extremely limited. They
7 could have submitted invoices. They could -- it's the Patent Owner, right?
8 They have all of this information. And it's their burden, right? So it's up to
9 the Patent Owner to prove their case for 2003 in the face of evidence that it
10 was extremely limited.

11 So again, talking about the commodity corn system, I don't even
12 know that we have to focus on the extremely limited because we still have to
13 answer the readily available aspect of it, which is, how does the public find
14 it? Where was it? What state was it in, right? So even separate and apart
15 from the fact that it's our position that there wasn't enough of it to begin
16 with, they would still fail on the readily available showing because there's
17 just nothing in the record for them to meet -- again, even a preponderance of
18 the evidence standard on where a member of the public would go, right?
19 Readily available --

20 JUDGE FITZPATRICK: Where would they go in 2006?

21 MR. MCKEOWN: They would go to commodity brokers, right?
22 Because after three seasons, there would have been enough seed that you
23 wouldn't need to know, well, where -- you know, when this product
24 -- excuse me, when this product was launched, where was it launched, right?
25 What farmer had it after the -- after three years of increased volume, right,

1 all of that falls out of the equation. And again, this is Patent Owner's
2 burden. We have evidence in the record that the plantings increased. We
3 have testimony from someone in the field that states that it was extremely
4 limited in 2003. And there's no rebuttal on the other side. And it's their
5 burden.

6 So, you know, again, that's the commodity system Patent Owner is
7 relying on one growing season by definition, not three. And so they need to,
8 at a minimum, not only address the extremely limited quantities that were
9 used at launch but all of these other questions which relate to, well, you
10 know, we can quibble here about what extremely limited might mean. It's
11 certainly less than what it was three years ago. And it is your burden under
12 this clear and convincing standard to explain why you would be entitled to
13 this exception to the seed deposit rule, where we can fill out a form and mail
14 it in, right?

15 That's pretty simple, you know, going around the country and just
16 guessing, right? None of this information was publicly available, right?
17 That's the opposite. Extremely limited is the opposite of readily available.

18 JUDGE FITZPATRICK: So --

19 JUDGE YANG: All right. Counsel, I have a question. I believe
20 one line of argument from Patent Owner is to emphasize readily available is
21 not to the POSITA, it's to the public. And farmers, even if they are under
22 the restriction, contractual restriction, they are part of the public. And the
23 seeds are readily available to them. Would you -- what's your response to
24 that?

25 MR. MCKEOWN: Well, again, Your Honor, I would go back to

1 Slide 5, where Patent Owner has argued that seed is not accessible to
2 farmers because it's under contractual agreement, you know. The debate
3 about -- you know, the rule is readily available to the public, so -- right,
4 that's the rule. If a POSITA can't find it, right, good luck for someone in the
5 public that doesn't have the same level of skill. So, you know, to the extent
6 that there's a discussion in the record about what a POSITA would be able to
7 locate, right, you would expect them to locate it first before a member of the
8 public. And the record shows that a POSITA would not be able to do that.

9 So again, this was argued in the principal brief, this commodity
10 theory, I think recognizing the issues with the extremely limited inventory of
11 seed there, in addition to the just complete lack of any explanation or proofs
12 as to number one, what readily available means in this context or how a
13 member of the public would go about finding the seed, right? It's not
14 enough to just say it existed. It was known -- as I mentioned at the outset,
15 it's known and readily available.

16 So we have a pivot here in the sur-reply away from the commodity
17 theory to a new argument. And this is on the bottom of Petitioner Slide 10.
18 So you see it there. Well, how about if some member of the public just went
19 to the corn grower and bought it instead of going through the commodity
20 system? I don't know that that argument changes any of the deficiencies
21 with the commodity system. You would still need to know who that farmer
22 was, what state they were in town, et cetera, to be able to do that. And then
23 it's less than clear that if you approached that farmer and told him you were
24 doing research, that he would also not be liable under contract for collusion
25 with someone else in that regard.

1 But again, I don't know that we need to go down that road because
2 who that farmer was is a problem in the commodity system, it's a problem
3 with this theory. And then finally, they say, well, if that -- if none of that
4 works, then you could just buy it from us. But again, they told the European
5 Patent Office in no uncertain terms that when someone buys it from them
6 under their contractual restrictions, that that is not enough because you can't
7 do what you need to do to analyze all of the support for 112 where the event
8 is without doing the research, which you're not allowed to do under the
9 terms of the contract.

10 So again, Patent Owner is seeking to avail itself of an exception
11 here where they have the burden of production under a clear and convincing
12 standard. Known is not enough. We need some factual showing somewhere
13 other than it was in the commodity system. And we just don't have anything
14 close to that.

15 So at this point, I would ask the panel to maybe switch over to
16 Patent Owner slides. Because I think the best point I can make is by looking
17 at Patent Owner Slide 2, the very first slide, as to why Patent Owner's
18 arguments fail.

19 So you see there on Patent Owner Slide 2, the red box. That's the
20 finish line, right? That's when the application was filed. That's when
21 enablement has to be in place. Now, Patent Owner on this slide has
22 identified the boxes on this slide as the key evidence. So in order to decide
23 this case correctly, I would submit in favor of Petitioner, you just need to
24 look at Slide 2. And so let's walk through these boxes.

25 So starting at the bottom. We have two magazine articles that

1 Patent Owner has represented. Again, admissions in the record to the EPO,
2 these are mere paper disclosures, right? You know, the paper is not getting
3 in there, so we can X those out. Provisional application, same thing, paper
4 disclosures.

5 Large rectangular box on the bottom, they say, well, Petitioner has
6 pointed out that after three growing seasons, right, it's even bolder, bolder
7 over the course of three growing seasons. The seed would have been readily
8 available. That doesn't help them because there was only one growing
9 season prior to that red box.

10 On the top, we've got an unremarkable admission from Petitioner's
11 expert that, you know, 1507 was known. Again, it's known and readily
12 available, it's not just known. And then we have the commodity corn theory
13 box right next to that one, we've already been through that. And then
14 finally, we've got the box at the top. Well, in a trade report, the growers,
15 whoever they are, wherever they are, they like the seed.

16 So where are -- where is the factual evidence of the term of degree
17 readily available? All we have here is it was known, it was mentioned in
18 magazines. The Petitioner's expert agreed that it was known. And three
19 years after the fact -- excuse me, two years after the fact, it may have been
20 available in the commodity system. This is the key evidence, right?
21 Because Patent Owner has identified it as such, and it's not me.

22 And the red box there, like I said, is the finish line. So in order to
23 find in favor of Patent Owner, there has to be something on this page that is
24 clear and convincing. That address is not only known, but also readily
25 available, right? Where are the facts? And again, Patent Owner has all this

1 evidence, presumably. Where is the witness in the field that would push
2 back on this extremely limited availability of the seed in this time frame?
3 Where are the sales invoices of the quantity? Where are the farms located?
4 What was the geographic distribution? What was the acreage? Nothing.

5 You know, they fault Dr. Silverstone for not identifying all of this,
6 but that's not his burden. And by the way, he can't get any of this
7 information unless Patent Owner provides it in this record. So, you know,
8 Patent Owner did not deposit their seed, and this is not enough to make it
9 readily available to the public. That's really all there is to it -- to this case is
10 Slide 2, Patent Owner slide. That's all you need to do to, again, correctly
11 find in favor of the Petitioner.

12 And you can look at Patent Owner Slide 3, which has a bunch of
13 additional boxes. But again, this is retroactive enablement here. There is no
14 regulation that the agency can enforce that overrules the enablement statutes.
15 You just can't get there from here. Everything important to you in the
16 petition that this panel has to make is on Slide 2, and it just doesn't get you
17 there.

18 I'd ask the panel to take a look at -- or excuse me, Patent Owner
19 Slide 7. You will see a lot of discussion of testimony from Dr. Silverstone.
20 What you will notice on this slide is he is asked to presume what it is the
21 Patent Owner is setting out to prove that is readily available. Access is not
22 the standard. You'll see seven different uses of the word if on this slide. In
23 our briefing, we've pointed these what if scenarios out. Dr. Silverstone was
24 simply asked to presume what -- you know, it's Patent Owner's burden to
25 prove here.

1 So the testimony from Dr. Silverstone is just confirming what
2 could have been done had the seed been in hand or had he known, right,
3 where to go, what farm, what grain elevator, what part of the country to
4 presumably do the type of screening that Patent Owner is insisting rendering
5 its seed readily available without detail.

6 And then finally -- and I'll just reserve whatever I have left. I
7 would ask you to turn to Patent Owner Slide 37. There is numerous slides
8 here on -- you know, public accessibility for the purposes of 112 does not
9 mean unrestricted use. There's two problems with this. No one is arguing
10 for unrestricted use. What we are arguing is if you are going to avail
11 yourself of an exception to a rule, then that readily available showing needs
12 to at least be commensurate with the scope of the rule.

13 So we're not arguing for unrestricted use. We're not even arguing
14 for public accessibility. The slides -- you know, the standard here, as we
15 pointed out at the very beginning, is readily available, right? This isn't
16 public accessibility in a sort of printed publication sense. This is a specific
17 standard and a specific regulation that is not addressed anywhere in this
18 record by Patent Owner. It's their burden of production. It's clear and
19 convincing. There's just nothing here that will allow Patent Owner to avail
20 itself of this exception to the rule. So if there's no further comments, I'll
21 reserve the remaining time for rebuttal.

22 JUDGE YANG: All right. Very good. Patent Owner, would you
23 like to reserve any time for surrebuttal? You are on mute.

24 MS. SOMMERS: Your Honor, I'd like to reserve 10 minutes,
25 please.

1 JUDGE YANG: Okay.

2 MS. SOMMERS: Good afternoon, Your Honors. Again, I'm Erin
3 Sommers from Finnegan on behalf of Patent Owner of Corteva Agriscience.
4 May it please the Board.

5 At the outset, I would like to preserve any objections and express
6 no waiver of this real party and interest issue. We believe that if they are
7 real party and issue, interest that should have been raised by mandatory
8 notices. And I'll just note that we haven't had the opportunity to take any
9 discovery on that issue or assess how it might impact the outcome of this
10 proceeding.

11 JUDGE YANG: I just want to make sure the RPI issue doesn't bar
12 this proceeding, correct?

13 MS. SOMMERS: Your Honor, I'm not sure I have the facts to
14 answer that at the outset. I would have to consider that.

15 JUDGE YANG: Okay. Go ahead with your other presentation.

16 MS. SOMMERS: Thank you.

17 JUDGE FITZPATRICK: And I would just add that I don't plan on
18 doing anything absent some sort of motion. I'm not going to rule on whether
19 someone's an RPI or not. So I understand that neither of you are waiving
20 your positions about it. But I think it's just going to -- nothing's going to
21 happen unless one of the parties takes action.

22 MS. SOMMERS: Thank you, Your Honor. In Petitioner's
23 statement, we heard a lot of new arguments that were not made in the
24 petition. These include, for example, that this readily available standard is a
25 term of degree. That language is nowhere in the petition or any of the

1 briefing. They also talked about that there needs to be factual
2 determinations made and set many of them out for known and readily
3 available. Again, not in any of Patent Owner's -- Petitioner's briefing,
4 excuse me, Petitioner's briefing.

5 Additionally, Petitioner asserts that the standard should just be the
6 same as any restrictions on seed deposits equivalent to that same type of
7 argument was not previously made in the briefing. And this goes to some of
8 the factors that Petitioner's Counsel was arguing. What farmers, what town,
9 what brokers, what crop yield, what weather, what metric tons to sift
10 through, I'd like to set those comments in perspective.

11 But first, it's important to address what standards apply here.
12 There is no clear and convincing evidence standard that applies to Patent
13 Owner. Patent Owner does not have any burden of proof in this proceeding.
14 The burden of proof lies with Petitioner, and it never shifts. What does
15 happen is there's a burden of production that is not tied to a clear and
16 convincing evidence standard or a preponderance of the evidence standard.
17 That burden of production is to come forward with evidence and argument
18 to support or showing that Patent Owner is entitled to that April 2004 date,
19 which there should be no dispute that it is.

20 It was only after Patent Owner made those arguments of
21 entitlement and pointed to extensive evidence of record that it is entitled to
22 that priority date that Petitioner's expert -- with Petitioner's expert making
23 some of those very limited arguments. Patent Owner never addressed them
24 -- excuse me, I'm confused. Petitioner never addressed those arguments in
25 its reply paper. It has the burden of persuasion to show by a preponderance

1 of the evidence that we are not entitled to our filing date. And that's law that
2 is set forth in Dynamic Drinkware.

3 I'd like to address first the issue of the commodity streams. And
4 I'd like to be very clear, there's been no pivoting arguments, there's no
5 waiver. I'm a little confused about what the waiver argument is. But we
6 argued in our Patent Owner response that either it's accessible to the farmers
7 in -- to the farmers by purchasing seed; or alternatively, it's available to the
8 public in the commodity stream. That has been our consistent argument
9 since the beginning.

10 But let's talk first about the commodity stream. And if we could,
11 I'd like to bring up our Slide 2. Pre-institution, Petitioner argued that corn
12 harvested from TC1507 plants was available after each of the 2003, 2004,
13 and 2005 growing seasons, and that was without restrictions. They argue
14 that at petition page 52.

15 Dr. Silverstone, their expert, pre-institution, said in his declaration
16 at paragraph 131 that TC1507 seed was widely planted in each of those
17 years, including 2003, without any qualification or limitation that it was less
18 than 2003. He also asserted, pre-institution, in paragraph 143 of Exhibit
19 1007, his declaration, that a person of ordinary skill in the art could have
20 obtained commercially available bulk corn following, among other seasons,
21 the 2003 growing season. He confirmed that some of the crop from 2003
22 that had been planted with TC1507 seed would have been available
23 immediately after harvest in the fall of 2003, and that some of the crop
24 would have been available in that commodity chain as of the end of 2003.

25 It wasn't our argument that the corn was available in the

1 commodity stream. Both Petitioner and Dr. Silverstone mentioned that
2 multiple times, pre-institution. Fast forward to post-institution, during Dr.
3 Silverstone's deposition testimony, he asserts for the first time that the
4 TC1507 was very limited in sales the year of 2003, or that it would have
5 been extremely difficult to find the corn.

6 But the Board should give no credence to these statements that
7 were made during his deposition. Why? Well, Dr. Silverstone also admitted
8 during his deposition that he hadn't considered any sales data for TC1507.
9 He also hadn't considered any acreage data for TC1507. And importantly,
10 he noted that he personally was not involved in TC1507 and didn't have
11 personal knowledge of it. So there is no basis to support his opinion that he
12 raised for the first time, post-institution, after saying that it was widely
13 available, pre-institution.

14 This is important because the next paper that Petitioner had, their
15 reply, they should have supplanted the record if they thought was necessary
16 to demonstrate by their preponderance of evidence standard that we were not
17 entitled to the showing that they themselves had already made. And if you'd
18 like those citations, it's Exhibit 2003, pages 54 through 59 and 64.

19 JUDGE FITZPATRICK: Ms. Sommers, the Herculex trademark is
20 specific to TC1507 corn, right?

21 MS. SOMMERS: That's right. There's no --

22 JUDGE FITZPATRICK: For your company. It doesn't cover
23 other -- what do you call it -- you know, other breeds -- that's the wrong
24 word of course, so it's specific to TC1507. I keep seeing it in the record that
25 word, Herculex, typically trademark is used to identify products, identify

1 origin. And we've been spending a lot of time talking about how -- whether
2 or not someone could have identified corn having TC1507. Is there any
3 evidence in the record of how Herculex fits into the equation?

4 MS. SOMMERS: I want to make sure I understand your question
5 as far as how Herculex fits into the equation. I don't think there's any
6 dispute on this record, Your Honor, that everyone agrees that the TC1507
7 event is, for lack of a better word, synonymous with the Herculex I
8 trademark. Petitioner said that in their petition. It is stated in the EPO file
9 history. That's evidence of record in Exhibit 1003. And there are other
10 documents of record that link the two.

11 JUDGE FITZPATRICK: Okay. And then a second -- thank you
12 for that clarification. Second question, is there anything in the record
13 showing how Patent Owner uses the trademark? Who does it get broadcast
14 to? And how could people - POSITAs potentially use that trademark to find
15 your corn during the relevant time, 2003?

16 MS. SOMMERS: Yeah. Well, if Your Honor is asking how was it
17 broadcast and how was it known, we have that here on Slide 2, for example.
18 So the Herculex I trademark was used throughout third party trade press
19 publications. Dr. Silverstone in his declaration, pre-institution, stated that
20 the trade press abounded with disclosures about Herculex I. It wasn't just
21 the trade press that knew about it. There are patent publications on the
22 record that also said that this trait could be purchased from -- I think it was
23 Dow at the time and Pioneer under the Herculex I trademark. So have I
24 answered Your Honor's question there?

25 JUDGE FITZPATRICK: I think so. Let me just follow up. This

1 is probably a nothingburger. Can I assume that Herculex is used to advertise
2 TC1507 seeds to farmers and not to advertise, you know, corn for
3 consumers?

4 MS. SOMMERS: I'm not sure -- I think anybody who is interested
5 in the products that Corteva is selling, whether it be a researcher at a
6 university or a regulatory authority or a farmer, that Herculex I trademark is
7 projecting that this is the trait that's covered by it. So I don't think it's
8 limited to farmers, if that's the question.

9 JUDGE FITZPATRICK: Yeah. I'm trying to -- let me put it
10 another way instead of open-ended question. Do you have anything you
11 could point me to in the record that shows that someone can -- that someone
12 could use Herculex, that term -- they see that trademark to find corn that
13 grew from a Herculex plant, as opposed to using that trademark to find how
14 to buy the seed from Corteva?

15 MS. SOMMERS: I think there are two ways that provide some
16 evidence of that on the record, the first is in Exhibit 2004. That's the
17 SeedQuest article that Patent Owner made of record. And it talks about kind
18 of the satisfaction with and the summary -- this is on Slide 32 for the Board's
19 convenience -- after that growing season.

20 In that article, there is a comment about farmers who chose not to
21 use TC1507, the Herculex I product, in that first year in 2003. And it says
22 when they were asked about it, the -- but had decided they would in 2004.
23 And when asked about that, it says among the reasons growers gave for the
24 change were spectrum of insect protection, the addition of western bean
25 cutworm to that spectrum and agronomic performance, "based on Herculex I

1 hybrids that they viewed in plots last summer." So they were able to see the
2 Herculex I corn growing in 2003. So that's evidence that a linking of
3 TC1507 with Herculex I.

4 JUDGE FITZPATRICK: Thank you for the answer.

5 MS. SOMMERS: Now, putting aside the fact that Dr. Silverstone
6 has no basis for his comments that contrast with what he asserted, pre-
7 institution, that TC1507 seed itself was widely planted in 2003, it's
8 important to note that, you know, Counsel from the other side says readily
9 available is a term of degree, again, an argument that they had not made
10 previously. But I think we can -- rest assured that 112 doesn't -- actually
11 doesn't require a specific level of accessibility when it comes to public
12 access. And the basis for that is the Metcalf decision that has been cited of
13 record in this case.

14 Now, of course that doesn't relate to seed deposits, but it does
15 relate to the concept of getting material -- here, a resin -- to practice the
16 claimed invention. The disclosure in that case identified resins that could be
17 purchased in Australia. And when the appellant was arguing for its
18 enablement or lack thereof, basically the Court said -- and this is the
19 predecessor to the Federal Circuit said in section 112, no mention of
20 convenience is made. Thus, even if the origin of the material is in Australia,
21 that is merely a matter of degree of convenience and not a matter of lack of
22 availability.

23 And as we all know, that there -- the Petitioner said by 2006, you
24 could get this in commodity streams, you could test it, and you would have
25 the invention in hand. The panel asked, are there any changes in

1 circumstances? Petitioner offered zero change in circumstances, other than
2 just a natural uptick to suggest that there would have been any changes in
3 circumstance. And importantly, they themselves got access as recent as
4 2020 allegedly by the commodity stream. Again, no circumstances between
5 2003 and 2020 have they asserted has changed in any way that anybody
6 -- the public could get access via the commodity streams with no
7 restrictions.

8 But even if that weren't enough, I think we have ample evidence of
9 record to demonstrate that it wasn't just a small amount in the stream.
10 Counsel asserted that there must be an equivalent scope for seed deposit and
11 the known and readily available standard.

12 One of Petitioner's exhibits, Exhibit 1018, that they cite to show
13 that there were other seed deposits by Patentee indicates they cite to column
14 4, lines 41 to 46. It does talk about a deposit, but that deposit there were
15 2,500 seeds. Even if there was only a few acres planted of TC1507 in the
16 2003 time frame, that would have far outnumbered the 2,500 seeds deposited
17 in that particular circumstance. And that circumstance is a granted patent
18 that I'm holding and apparently complied with the seed deposit rules. So if
19 there needs to be evidence that they're equivalent on the record, again, their
20 own evidence leads to that undisputed conclusion.

21 I'd like to touch for a moment on the topic of restrictions and the
22 discussion about the EPO file history. As Petitioner's slide said, the facts are
23 the facts. They haven't changed. The same technology use agreement that
24 was cited in that file history is the same technology use agreement that we're
25 talking about here in the proceeding.

1 What's different with the EPO statements is that those statements
2 were being made in the context of what was an invalidating public use at the
3 time, not in the context of enablement. And that does matter because there's
4 not any evidence on the record or discussion by Patent Owner that those
5 legal standards, one in Europe and the known and readily available standard
6 here, are so the same that those statements have any bearing. But even if
7 they were the same, they should not have any bearing here in the present
8 situation.

9 I also would like to just note that when Counsel identified our
10 slide, the printed publications, Exhibit 1047 and 1048 on Slide 2, as being
11 exactly the type of printed publications, I think he might have been -- even
12 said the publications related to the EPO proceeding, those exhibits were not
13 the ones that the EPO was grappling with. That was Exhibit 1032 that is of
14 record here. And that was also cited on the face of the '378 Patent.

15 But if I can turn to the restrictions on use point, the rules only
16 require access. And rule 1.808(a)(2) simply states that all restrictions
17 imposed by the depositor on the availability to the public will be reviewed,
18 not necessarily that there cannot be any restrictions on the use of the
19 particular material.

20 Basically, under the case law, a seed deposit or the known and
21 readily available standard has to be as accessible to the public as a published
22 patent application or issued patent in another field that doesn't have this
23 added requirement of having biological activity.

24 JUDGE YANG: And also, you said case law relating to seed
25 deposit and readily available, which one is related to -- address readily

1 available. Could you point one to us?

2 MS. SOMMERS: Your Honor, we've cited multiple cases on the
3 record. And those are the Argoudelis case, which is the earliest one, the
4 Feldman case --

5 JUDGE YANG: That addresses the readily available issue?

6 MS. SOMMERS: Yes, Your Honor. I'd like to explain how. So
7 the facts in those cases, it is true, relate to the factfinder grappling with kind
8 of public accessibility in the context of the seed deposit. But each of those
9 cases is really discussing at the outset the rationale and the reason for having
10 the seed deposit and the timing for that seed -- those seed deposits or
11 otherwise known and readily available.

12 Specifically -- and I would urge that each of the Court's reasonings
13 in those cases and the rationale in those cases is equally applicable to the
14 known and readily available standard. And I will point out that each of
15 those cases identified the known and readily available standard as a
16 possibility for complying with biological materials under section 112. But
17 the --

18 JUDGE YANG: I would just -- I'll just mention the reason I have
19 this question is I thought -- maybe I misunderstood. I thought at the
20 -- earlier, you actually criticized Counsel for Petitioner for sort of equating
21 the standards for deposits, and that they're readily available. So at what time
22 we should say, well, the standards for these two prongs are the same and at
23 other times they are not. Could you address that?

24 MS. SOMMERS: Yeah. I'd like to be very clear on it. So the
25 rules 1.802(b) offers two alternatives. First, rule 1.802(b) says if a

1 biological material is not necessary for 112 compliance, it need not be
2 deposited. Our examiner in the case here considered enablement and said no
3 deposit.

4 But putting that aside, rule 1.802(b) says either, you can do a seed
5 deposit that otherwise complies with the rest of the rules in 1.800, or you can
6 other -- a seed deposit is not necessary if it's otherwise known and readily
7 available. Rule 1.809 talks about the procedures for doing that if a seed
8 deposit hadn't been made, which includes arguing during prosecution, again,
9 that was not necessary here and showing of known and readily available.

10 We believe that there are certain things that are the same for these
11 and certain things that aren't. Obviously, the rules have some limitations
12 about identifying certain things and what type of depository there needs to
13 be that would not apply to the known and readily available standard because
14 if a seed deposit is not -- that's an alternative to a seed deposit in the first
15 place. So there are certainly differences between them.

16 As far as when does the public have to have access under either
17 case, the case law is clear that that has to be at the time of issuance. That's
18 when the public needs to have that accessible to it. And we know that from
19 the rules that have been promulgated since the Argoudelis, Feldman, and
20 Lundak cases, which, again, we're not disputing the facts of the them relate
21 to situations where there were seed deposits. But the concepts and the
22 holdings are broad enough and applicable that it also is what has to happen
23 with a known and readily available standard.

24 In fact, the Feldman case basically criticized the appellant saying
25 the basic Aaron Feldman's position is the elevation of the specific facts

1 presented in Argoudelis to the state of a rule of law, basically saying what
2 Argoudelis did with its seed deposit is not the only way to do it. And it
3 highlights that there's flexibility in this analysis and needs to be decided on a
4 case-by-case basis.

5 And that leads back to the evidence of record. The relevant time,
6 if we can turn to Slide 3, is that the public have access upon issuance of the
7 patent that happened in December 2014. As was already found, factfinding
8 was made at the time of institution. It was undisputed that corn harvested
9 from TC1507 plants was known and readily available to the public by that
10 time.

11 Petitioner itself submitted additional evidence with its reply,
12 Exhibit 1086, that indicates -- I believe it was in 2007 reporting that there
13 was tremendous demand for the Herculex product, that they were planning
14 to sell 10 times more than the year before in 2006, and that they were still
15 going to sell out of that product. So there is no dispute that the public either
16 could have bought the seeds, TC1507 seeds, or obtained them in the
17 commodity strains, as Counsel has said.

18 But that takes me back to the restrictions, I just want to make sure I
19 talk about those. The access to the public of biological material is one way
20 to kind of fit in a box, inventions and disclosures that don't quite otherwise
21 comply with a written description of 112. And again, I'm not suggesting that
22 that's appropriate here since the examiner concluded no seed deposit was
23 necessary.

24 But the case law, Argoudelis, Lundak, Feldman basically stand for
25 the proposition and say and -- I think the PTO's rules promulgating this

1 -- not the rules themselves but the commentary say that the public access
2 needs to be as much as it would be on another invention's public disclosure
3 by publication. But a publication we all know of an invention that doesn't
4 relate to the biological sciences does not give the public an unfettered use to
5 practice that invention during the enforceable period of the patent. The
6 technology use agreement here is -- and it falls within the exclusionary right
7 of that patent grant that others who don't have biological needs to deposit
8 anything or show as known and readily available would just have.

9 How do we know that the technology use agreement falls within
10 the scope? Well, the JEM case is a Supreme Court case that talked about
11 whether plants themselves could be protected by utility patents. And it
12 concluded that they could. And in that case, the Supreme Court stated that
13 there are no exceptions -- or no exemptions for research or saving seeds
14 when there is a utility patent granted for a plant. Later, Federal Courts
15 applied this holding to show that the technology use agreements that are
16 used in this area fall within that exclusionary right, and that's the McFarling,
17 the Scruggs, and the Ottawa case.

18 The Ottawa case in particular included a technology use agreement
19 that had a research -- did not allow for research. The public had access
20 under these technology use agreements. Dr. Silverstone admitted this during
21 his deposition, that's Slide 42. He said, even with the restrictions on use,
22 you could get the material, yes. And he did not limit that to farmers. It
23 could be the public in general as long as they were going to comply with the
24 technology use agreements.

25 But importantly -- and this is where it comes back to Counsel's

1 argument that we're just asking for the same treatment -- the restrictions
2 under the technology use agreement are no more onerous than the
3 restrictions under seed deposit. First of all, Dr. Silverstone himself didn't
4 consider any restrictions on seed deposits. So there's no evidence from
5 Patent Owner -- excuse me, Petitioner, as to what restrictions are. And Dr.
6 Silverstone didn't take that into his consideration.

7 But if we look at the material transfer agreement in this case, Slide
8 44, as one of Your Honors pointed out, that this is a part -- contract between
9 ATCC and Inari here shown on the slide. It's not with Patentee. But it alerts
10 the buyer of this material that you may have other rights, you may have
11 other restrictions that you need to be aware of, and purchaser shall have the
12 sole responsibility of obtaining intellectual property rights. So there is no
13 immediate right to use a seed for research that's obtained from a seed
14 depository.

15 JUDGE YANG: On that issue, in the same document, Exhibit
16 2007, the -- the paragraphs bridging at the very end of page 1 and the 2
17 bullet points, top of page 2, it specifically mentioned that purchasers'
18 investigators may use transfer modifications and unmodified derivatives
19 only as follows. And it talked about the research project. And I think the
20 Counsel for Petitioner also emphasized that the -- whatever the limitations,
21 the restrictions in this MTA is -- research is not excluded.

22 And therefore, if somebody got hold of the seeds could identify the
23 TC1507 event versus the contractual agreement with the farmers. If I
24 understand it correctly, other than planting it or probably calculating the
25 -- how much the harvest is, that sort of thing, you cannot do anything else

1 with that. So I'm not sure. I'm trying to figure out the -- how similar these
2 two restrictions are. If you could address that, that would be good.

3 MS. SOMMERS: Your Honor, we don't agree that a seed deposit
4 necessarily provides a right to research. Keep in mind that these
5 depositories take in all kinds of biological materials, including materials that
6 are potentially not even patented. And so this is a third-party agreement
7 with that -- this particular depository. And it has its own rules. And that's
8 what's being pointed to by Petitioner.

9 And again, talking about what that depository is going to let you
10 do with materials that you get from them because they're holding them in.
11 But a seed deposit itself is inherently restricted by potential infringement.
12 And that can be seen, for example, in -- again, going back to Exhibit 1018,
13 the Patent Owner -- sorry, I keep doing that, that Petitioner cited in its
14 petition that does relate to a seed deposit, it's a patent. And notably there in
15 talking about its seed deposit, it says at least 2,500 seeds were deposited
16 have been -- I'm quoting now, "Have been deposited and made available to
17 the public without restriction (but subject to patent rights)."

18 This was something that a patent issued. It was compliant with the
19 deposit rules in the Patent Office. And it shows that you don't have
20 unfettered use. A district court said that as well, that's at Slide 46. When
21 considering seed deposits, rule 1.808 does not require that Corteva give the
22 world a blanket license to its invention just because it deposited seeds. This
23 is important. The public is entitled to the availability, just like the resins
24 over in Australia that may be kind of hard to get, but not to exploit them in
25 any way. A restriction on commercial use is entirely consistent with the

1 Patent Office's rules.

2 JUDGE MAJORS: I have a question, Counsel, on that. Section 12
3 says that there has to be a description sufficient for the reader to make and
4 use the invention. But one might characterize the restriction put under
5 contract to say you can't even use these. And I see that as a bit perhaps of a
6 problem. I mean, it's one thing to say, well, they can use it, but then they'd
7 be committing an act of infringement for which you might be compensated.
8 But to put a contractual restriction that says, you can't even use it to begin
9 with, that seems like a different animal altogether when we're talking about
10 compliance with 112.

11 MS. SOMMERS: I don't think it is. And I don't think it runs afoul
12 of the quid pro quo of 112. And it goes back to the comments I made
13 regarding a patent issued or even a patent application that has published in
14 another art that doesn't require or even get involved into seed deposits. That
15 disclosure is publicly accessible.

16 But if one wants to get that and go out and do the research and
17 practice the claimed invention, they are subject to potential liability for that.
18 And what the courts have said with these types of plant patents in particular,
19 that the exclusionary right doesn't allow for research, doesn't allow for
20 saving seeds. So the technology use agreement, those contractual rights that
21 you're pointing to, Your Honor, are sanctioned, if you will, under the patent
22 statute and still doesn't run afoul of section 112.

23 And just to be clear, there's no dispute that the disclosure itself was
24 sufficient -- was insufficient in any way. Petitioner has repeatedly said it
25 describes TC1507 event. It clearly lays out the DNA sequence. It says how

1 it was made in the first instance. It talks about how you can make more of it
2 by planting and breeding and how to screen for it. So a lot of Patent
3 Owner's cases in that -- Petitioner's cases in that regard, White Consolidated,
4 Grandics, DeCastro, are simply inapplicable. Because in each of those
5 cases, the written description itself was hiding the ball as to what was
6 underlying the ability to practice the invention.

7 All right. Your Honors, if there's no further questions, I will
8 reserve the rest of my time. But I would like to just make the point that
9 Patent Owner believes that it really would kind of upend the quid pro quo of
10 the 112 and what's given to the Patentee under the patent statute to allow a
11 fully enabled written description at the time of its earliest filing and the
12 provision of access, that there's no question was available to the public at
13 multiple time paths and certainly before the patent issued in 2014 to render
14 unpatenable those claims as though that same disclosure, that same access
15 were prior art, when they're just not.

16 JUDGE YANG: All right. Thank you. You have 23 minutes for
17 your rebuttal.

18 MR. MCKEOWN: While I'm sharing my screen here, if there's
19 any questions from the panel, I'm happy to address those now before
20 jumping into it.

21 Okay. So yeah, just a few quick points. Seed deposit rules allow
22 for research. It's stated right there in Slide 7, the screen capture of the actual
23 statement -- excuse me, Petitioner Slide 9. So Patent Owner's argument that
24 you can't do research to ascertain enablement without infringing the patent.
25 That can't be correct. And the reason that it can't be correct is again, this is

1 what Patent Owner put in writing in the EPO file history.

2 So maybe it's helpful in that regard to take a look at Exhibit 1003.

3 So this is the EPO file history cited in the Petitioner's reply brief and
4 specifically at page 543. So 543, I believe, is cited on Petitioner Slide 5.

5 But I just want to highlight a portion in the same paragraph that's not on
6 Slide 5. And it starts -- again, this is page 543, Exhibit 1003, the EPO
7 prosecution history.

8 Bearing in mind the subject matter -- so I'm reading from the
9 middle paragraph, second full paragraph down from the top of the page.

10 Bearing in mind the subject matter of the present claims, which is shaped
11 around the sequences of the event contained in TC1507 maze clearly
12 "research" access would be required to determine those sequences, which
13 itself is a necessary prerequisite for availability to the public.

14 That's what we're talking about when we're talking about
15 restrictions here. You can't sell your seed to the public and restrict them
16 from doing what the Patent Owner told the EPO, makes it publicly
17 inaccessible to ascertain the support of its patent and still have a patent. So
18 again, we can just look at what the Patent Owner has committed to writing
19 here.

20 There were some comments about Dr. Silverstone saying that
21 TC1507 was widely planted. And I just want to, again, just point again to a
22 slide that I think is the only one the panel really needs to assess here, it's
23 Patent Owner Slide 2. At the bottom of that slide, it is highlighted in bold.
24 We're talking about the course of three growing seasons, not the course of
25 one growing season. So Dr. Silverstone did not say it was widely available

1 after a single growing season. Again, that's Patent Owner's own
2 highlighting.

3 JUDGE YANG: So what's -- how do you respond to Patent
4 Owner's argument that you changed direction? Pre-institution, you said,
5 whether it's one season or three seasons, it's widely planted without any
6 -- without singling out the 2003 season as limited availability.

7 MR. MCKEOWN: I guess, if I understand what you're asking, I
8 think what this comes down to is just a mischaracterization of what was said.
9 Again, if you look at Slide 2, we were talking about over the course of three,
10 not over the course of one. So again, all along, we've argued that as of 2006,
11 there was enablement based upon three growing seasons. So we haven't
12 changed anything. It's just the Patent Owner chose to argue that we were
13 saying it was widely available in each one of those years, which is clearly
14 not the case.

15 JUDGE YANG: But just for me to make sure, pre-institution,
16 Petitioner didn't just argue, and Dr. Silverstone didn't testify specifically to
17 the seed availability or the commodity corn availability in 2003 season; is
18 that correct?

19 MR. MCKEOWN: Well, for the purposes of the petition, he was
20 focused on 2006. When he was cross examined and he was asked those
21 questions, he responded because 2003 was relevant to Patent Owner's case.
22 So Patent Owner asked the question, he provided the answer, you know,
23 which is typically what happens in these trial settings is we flesh out the
24 documents a bit more during the trial. So Patent Owner was specifically
25 interested in 2003, whereas pre-institution, we were focused on the

1 cumulative effect of the three seasons.

2 Just quickly on the privy RPI stuff, it is addressed in footnote 2 in
3 the Petitioner's principal brief where we point out the privy relationship.
4 There's just nothing there. It's a wholly-owned sub. It's never been sued on
5 this patent. There's no statutory bar. There's no need for discovery, right?
6 You can search the dockets and figure out if there's any kind of statutory bar.
7 So it's just a wholly-owned sub. It does not control us in an RPI sense.

8 JUDGE FITZPATRICK: There was a -- Mr. McKeown, can I go
9 back to Slide 2, that bottom right box, the language we were just talking
10 about, the widely planted.

11 MR. MCKEOWN: Yeah.

12 JUDGE FITZPATRICK: At the end of your remarks, you threw in
13 the word cumulative.

14 MR. MCKEOWN: Right.

15 JUDGE FITZPATRICK: Or maybe it was the adverb, I can't
16 remember how you put it. So is it your interpretation that this testimony is
17 saying that it was widely planted, which again is a characterization -- we
18 don't know exactly what that means -- but does that mean readily available?
19 Meaning . . . so he's -- it's readily available. Actually, let's just say that.

20 Is he saying that it depends on the -- you have to add 2003, 2004,
21 2005 to get it to be, you know, legally sufficient? And I'm asking this just
22 because you use that word cumulative, I want to know what you're saying.

23 MR. MCKEOWN: Yeah. I'm just, I guess, putting in different
24 words over the course of -- cumulative over the course of three growing
25 seasons, right? The argument from Patent Owner was that what we meant

1 was over the course of each of these growing seasons, which is not what was
2 stated. So the argument in the petition was, well, after three growing
3 seasons, right, over the course of these three growing seasons, there would
4 have been enough seed out there that one could go to the commodity system
5 and then screen for the event.

6 JUDGE FITZPATRICK: Okay. And is there -- it seems that
7 perhaps this language could be interpreted in two different ways. Is it your
8 position, you know, that it cannot be interpreted the way Patent Owner is
9 saying? I mean, I'm looking for, you know, your position, I guess,
10 grammatically. I mean, are you -- because I think it's correct. Someone
11 could say exactly the way that this phrase was said. And it could be -- they
12 could mean each of the three seasons. This is a -- to me, that's a logical
13 -- maybe not exclusive, but that's a logical interpretation. And if -- I'm
14 wondering if -- are you saying that it's ambiguous in -- or that it's open to
15 two interpretations and it meant something else, or are you saying that Patent
16 Owner's interpretation is not supported?

17 MR. MCKEOWN: Right. Your Honor, I would say it's not
18 supported, you know. When you look at this record, you know, here, we're
19 talking about planted. And as we've argued, planted is sending seeds to
20 farmers under the restrictions, right? So even if you could argue that, well,
21 one could read this to be, well, it was widely planted in each of one of those
22 three seasons, that still doesn't help Patent Owner connect the dots when the
23 farmers were buying the seed under restrictions. It's not commensurate in
24 scope with seed deposit rule.

25 And then they're relying on the commodity system. So, right, even

1 if that other interpretation was correct -- and we're not saying that it is -- you
2 still have to connect the dots of, well, okay, how would they go about
3 finding this. So the planted deals with what the farmers were doing under
4 contractual restrictions.

5 There was also a question I just wanted to address briefly to the
6 extent I think I know where, I guess, Judge Fitzpatrick, this was your
7 question about the Herculex trademark. Herculex is an -- it has insecticide,
8 herbicide benefits, so the value of that trademark is to farmers, right? So for
9 example, if you went to the grain elevator looking for, hey, we sell Herculex
10 or, you know, the grocery store, you would not see that. So it's not helpful
11 aside -- you know, to farmers that are looking at brand recognition when
12 they purchase their seed.

13 There were also a couple of points Patent Owner raised about
14 Petitioner changing arguments, right? This isn't a word matching exercise,
15 term of degree. If you look at the Petitioner's principal brief at pages 7
16 through 8, we talk about the factors, such as price. So, you know, whether
17 or not term of degree is in there, you know, in quotes, if you read the MPEP
18 that states that, right, commercial sales are not enough, we would, for
19 example, have to look at how much the seed costs. That's what we mean by
20 terms of degree and factual showing that show by the plain terms of that
21 standard, right, that it was in fact readily accessible. And we just don't -- we
22 don't have that in this record.

23 There was also a comment about the argument that it was new, that
24 we weren't -- you know, we didn't argue in the briefing about the seed
25 deposit being commensurate, right, with restrictions. That's right on page 1

1 of the principal brief, first paragraph, we're talking about the restrictions.
2 Maybe the word commensurate is not there. But again, all these arguments
3 are in there.

4 Finally, Dr. Silverstone's not an expert in contractual
5 interpretation. Questions to him about what restrictions mean in the context
6 of this rule or any other contractual interpretation, right, he's not an expert.
7 He's not put up for those types of issues. He's one of skill in the art in the
8 field. He's the only one in the record. His testimony about it being
9 extremely difficult to get in hand is the only testimony in this record.
10 There's no reason to disregard that testimony.

11 There were comments by Patent Owner's Counsel about the burden
12 of persuasion. No one is arguing or disputing that patent -- unpatentability is
13 met if the priority is deficient here. We're arguing about a priority
14 deficiency. Patent Owner admits the burden of production is on the Patent
15 Owner. And it is Patent Owner that is trying to avail itself of an exception to
16 a rule. So certainly, the burden is not on the Petitioner there, right? The
17 burden is on the Patent Owner under a clear and convincing standard. There
18 are no cases that deal specifically with this rule and that exception.

19 And for that reason, Patent Owner has not met its burden under
20 either clear and convincing or preponderance of the evidence. This
21 invention was not enabled. There was no seed deposit. And we can't look to
22 what happened in 2014 or 2020 to secure those deficiencies. So absent
23 further comment, I'll cede the remainder of my time.

24 MS. SOMMERS: Your Honors, just a few follow-up comments.
25 Regarding the statements made in the EPO file history, Counsel took you to

1 page 543 of Exhibit 1003. I'd just like to reiterate the context of -- the
2 context for those comments. And that same page says that it's not publicly
3 available "within the meaning of the EPC." So we're dealing with the public
4 availability in the context of a novelty -- potentially novelty destroying prior
5 art.

6 With respect to the grammar of the language that Dr. Silverstone
7 chose to use in his declaration, whether it's widely planted over each one of
8 those or over cumulative, that is something that Petitioner could have
9 addressed and did not address in its reply. In any event, they say that it's
10 following those seasons, not just all three seasons, it says each of those
11 season.

12 And it really shouldn't -- there shouldn't be a question as to the
13 level of availability in 2003 anyway. We have evidence of record. Dr.
14 Silverstone, in that same deposition, said that it was available and farmers
15 had it to plant. Exhibit 1040, which Petitioner cited in its petition in the
16 beginning is a year-end report for 2003 from Dow. And this is at Slide 27
17 for Your Honors.

18 Herculex was in commerce in the first time in 2003. And in part, it
19 contributed to 3 billion in sales and the volume grew by 4 percent. And this
20 document specifically says that that product was involved in it.

21 I mentioned earlier Exhibit 2004, which was an article that
22 published just before the April 30 of 2004, filing date that commented that
23 there were 11 hybrids with -- in Herculex insect protection. And those were
24 the top hybrids that Dow was providing at the time.

25 There's just simply no dispute that it wasn't accessible and it wasn't

1 available. As far as the farmers understanding Herculex and the trademark,
2 again, not an issue specifically fleshed out on the record before Your
3 Honors. But it was used, as I mentioned earlier, both as Herculex I and
4 TC1507. And it wasn't just to farmers. And we know that because Exhibit
5 1056, this is Slide 29, was a publication that was received in October of
6 2003. And this was a publication about PCR record methods.

7 And in the sample section it says grains, so corn, from five
8 reference methods materials were provided. And that included specifically
9 TC1507, and that was from the Korean FDA. So somebody, even besides
10 farmers, were getting their hands on these seeds and testing them, as
11 reported in this publication by this -- by the April 2004 time frame.

12 JUDGE YANG: But on this specific publication, my
13 understanding of Petitioner's response was that this is Patent Owner
14 providing the seeds to the regulators. There might be other countries here
15 -- in South Korea, it's for promoting the seeds in -- over in foreign countries.
16 And it doesn't mean the public actually has access to it. It's just the
17 equivalent of USDA. I forgot what it is specifically here, oh, KFDA, right?
18 Is the accessibility by KFDA equivalent to accessibility to the general
19 public?

20 MS. SOMMERS: Your Honor, I'm not sure that we know enough
21 information to know exactly the chain of title from the seeds that are used
22 here. But what I will say is this publication has authors that are not
23 themselves from the Korean Food and Drug Administration. It includes
24 authors that are from a university. And even if it were the Patentee giving
25 this to the researchers to develop the method or test the method, as this

1 article says, they still had access. There's no dispute that there was access to
2 it. And somehow, they got that access. And that's all that's required.

3 I'd like to just touch again on the concept of the -- Counsel said
4 seed deposit rules themselves, say, research is okay. That is not true. The
5 only evidence for that in record to support that statement is Exhibit 2007,
6 which is a material transfer agreement and not the rules. The rules
7 themselves say nothing about whether research is required to be part of the
8 seed deposit. And we know that because of how the rules were developed,
9 that it's not actually.

10 And if we can turn to -- I lost my slide now. Yup, Slide 39. In the
11 original advance notice of proposed rules, what has become rule 1.802(b)
12 was at the time 1.201(b). And the proposed -- the advanced notice of the
13 proposed rule stated at that time that biological material will be considered
14 to be known and readily available if samples of the biological material are
15 known and accessible without restriction to those who desire to obtain and
16 test the material for research purposes, if you will.

17 In subsequent iterations and the final rules, that language was
18 specifically taken out. And the commentary when it was taken out was that
19 we don't want the rules -- we don't want the known and readily available
20 standard to be bound by any aspect of the rules. Harkening back to the case
21 law that says it needs to be -- each case needs to be considered on its own
22 facts. And here, those facts are clear that the technology use agreement did
23 not prohibit public access to the TC1507 seed. In any event, the date of
24 issuance is the relevant date, and there's no dispute that it was accessible by
25 that time.

1 And finally, I'd just like to come back to a question that Judge
2 Majors asked. And that was the question about the technology use
3 agreement and the contractual provisions in it. And isn't that somehow
4 different than the seed deposit and potential infringement of a patent? It
5 comes down to liability. There's either liability for patent infringement or
6 there's liability for, you know, breaking a contract, a breach of contract. So
7 there really is no distinction between the potential liability that was already
8 given and permissible under the exclusionary right of a utility patent for
9 plants.

10 Absent any other questions from Your Honors, I'm willing to rest.

11 JUDGE MAJORS: I don't have anything further. Thank you.

12 JUDGE YANG: All right. Me neither. So we would like to thank
13 the parties for your time. Counsel for both sides did a great job in this case.
14 And today's argument is very helpful. This case is submitted. And we will
15 issue the final decision in due course. We are adjourned.

16

17 (Whereupon, the above-entitled matter went off the record at 1:47
18 p.m.)

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