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Paper No. _____
Date: February 3, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CARGILL INCORPORATED,
Petitioner,

v.

BUNGE LODERS CROKLAAN USA, LLC,
Patent Owner.

Case IPR2024-01360
Patent 7,645,473

PATENT OWNER'S SUR-REPLY
37 C.F.R. § 42.23

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TABLE OF CITED EXHIBITS AND PAPERS

Exhibit or Paper	Description
EX1001	U.S. Patent No. 7,645,473 to Herzing et al., issued on January 12, 2010 (“the ’473 Patent”)
EX1003	Declaration of Alejandro G. Marangoni, Ph.D. in Support of Petition for <i>Inter Partes</i> Review of U.S. Patent No. 7,645,473 (“Marangoni Decl.”)
EX1007	Petrauskaite, et al., “Physical and Chemical Properties of trans-Free Fats Produced by Chemical Interesterification of Vegetable Oil Blends”, <i>Journal of the American Oil Chemists’ Society</i> , vol. 75, no. 4 (1998): 489-493 (“Petrauskaite”)
EX1011	Neff, W.E., et al., “Oxidative Stability of Blends and Interesterified Blends of Soybean Oil and Palm Olein”, <i>Journal of the American Oil Chemists’ Society</i> , vol. 71, no. 10 (October 1994): 1111-1116 (“Neff”)
EX1014	Deffense, E., “Fractionation of Palm Oil”, <i>Journal of the American Oil Chemists’ Society</i> , vol. 62, no. 2 (February 1985): 376-385 (“Deffense”)
Paper 2	Petition for <i>Inter Partes</i> Review of U.S. Patent No. 7,645,473 (“Pet.”) Under 35 U.S.C. §§311-19 and 37 C.F.R. §42.100 <i>et seq.</i> (Paper 2, “Petition” or “Pet.”) filed on August 28, 2024 by Petitioner Cargill Incorporated (“Petitioner”) in <i>Inter Partes</i> Review Case No. IPR2024-01360

Case No. IPR2024-01360

Patent 7,645,473

Exhibit or Paper	Description
Paper 11	Patent Owner’s (“PO”) Preliminary Response (Paper 11, “POPR”) filed on December 27, 2024 in <i>Inter Partes</i> Review Case No. IPR2024-01360
Paper 12	Petitioner’s Reply to Patent Owner’s Preliminary Response (Paper 12, “Rep.”) filed on January 28, 2025 in <i>Inter Partes</i> Review Case No. IPR2024-01360

Petitioner's invalidity theory, premised on Petrauskaite in view of purported general knowledge, fails. The Petition does not rely on established knowledge or any known standard, but instead relies on specific values taken from non-ground references (chosen solely on the references being known), despite admitted variability in those values and with no motivation to combine showing.

A. Petitioner Admits It Avoided Expressly Arguing Inherency

PO is not creating a strawman. Petitioner does not contest that it made repeated statements confirming an inherency theory (*see* POPR, 15-17), and now admits that it “intentionally did not argue this concept.” Rep., 1. As the POPR showed, this was a transparent effort to avoid an inherency standard that Petitioner could not meet. POPR, 14-32. To circumvent the inherency standard, Petitioner asserts obviousness based on purported general knowledge, but in actuality is combining multiple references without a motivation to combine showing.

B. A POSITA Would Not Have Looked To Petrauskaite

Petitioner's arguments that the molar percentages disclosed in Petrauskaite can be converted to match the Challenged Claims (using the molecular weights and selected proportions of starting components) is manufactured. Pet., 14-15. The POPR demonstrated that a POSITA would not have looked to Petrauskaite because its starting components and interesterification process are critically distinct from those disclosed in the '473 Patent. POPR, 19-21, 32-33 (“differences in the

processes of the '473 Patent and Petrauskaite would have discouraged a POSITA from considering Petrauskaite as a starting point for the claimed invention.”).

Petitioner does not address or deny this fact. Instead, it argues only that the claimed invention does not require a specific interesterification process. Rep., 1. Petitioner has thus conceded that the processes are different, and fails to address why a POSITA would have considered Petrauskaite in the first place.

C. Petitioner Does Not Deny Relying On Non-Ground Prior Art

The POPR demonstrated Petitioner is not relying on “general knowledge in the art,” but instead on Neff and Deffense as non-ground prior art in combination with Petrauskaite. POPR, 36-38. In Reply, Petitioner does not deny this, and likewise does not address the case law demonstrating that it is improperly relying on purported general or common knowledge. *See* POPR, 33-36.

Instead, Petitioner’s counsel now asserts new arguments, for the first time in Reply, that Petitioner relied on Neff and Deffense based on a correlation in IV values with Petrauskaite. *See* Rep., 2-3. However, that justification is *absent* from the Petition. Petitioner never stated in the Petition that IV values were the reason it relied on those references. The only basis offered to look to Neff and Deffense was that they were known. *See* EX1003, ¶¶61-66, 181; Pet., 16. While Petitioner and the Marangoni Decl. recite various IV values, neither states Neff and Deffense were chosen based on IV values. Thus, introducing this new rationale is improper.

Petitioner's counsel tries to remedy this fatal defect using unsupported attorney arguments. Petitioner's counsel makes two highly misleading assertions by combining (in one sentence) quotes from the Petition with accompanying assertions not supported in the Petition. *See Rep., 2* ("the 'IV value is determined by adding proportions of the wt% of all triglycerides comprising unsaturated fatty acids that make up [an oil],' *i.e., the IV allows a POSITA to understand the type and quantity of fatty acids that make up a particular oil.*") (citing Pet., 7-8) (emphasis added); Rep., 2-3 ("a 'POSITA would have looked to old and contemporary references for the fatty acid distributions of palm stearin and soybean oil to determine the corresponding wt% of Petrauskaite's fat blends because this information was readily available and well-known in the art' *i.e., a POSITA would have looked to art disclosing soybean oils having an IV of ~134.2 and palm stearins having an IV of ~26.0 because these are the oils disclosed in Petrauskaite.*") (citing Pet., 38) (emphasis added). The italicized assertions by counsel are not found in or supported by the Petition or the Marangoni Decl. Thus, Petitioner's improper assertions and citations prove the fatal defect.

Nevertheless, Petitioner's obviousness theory fails because Petitioner does not contest that it is combining Petrauskaite with Neff and Deffense, yet those two non-ground references (or the associated IV values for that matter), are not even mentioned or cited in its motivation to combine discussion. *See Pet., 37-42.*

D. The POPR Demonstrated Petitioner's Flawed Calculation

In view of the above, PO respectfully believes the Board need not even reach Petitioner's last argument. Nevertheless, Petitioner does not contest that: (i) it assumed random interesterification; (ii) Petrauskaite discloses experimental values and values calculated based on a random distribution hypothesis, which are not the same; (iii) Petitioner used the experimental values (not the random distribution hypothesis values); or (iv) had the Petitioner used the random distribution hypothesis values, the claimed ranges would not have been met. *See* POPR, 43-48; Rep., 3-5. This demonstrates Petitioner's hindsight analysis.

To preserve the Petition, counsel again attempts to introduce expert testimony through unsupported attorney argument not found in the Petition or the Marangoni Decl. Rep., 3-5. The Petition is *totally* silent on why the experimental (and not the random distribution hypothesis) values were used. *See* Pet., 19-21. Petitioner bears the burden here, and that burden cannot be met by covert theories, misleading arguments, or attorneys giving expert testimony. *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (Petitioners must "identify with particularity the evidence that supports the grounds"); *Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.*, 853 F.3d 1272, 1286 (Fed. Cir. 2017). ("Shifting arguments . . . is foreclosed by statute, our precedent, and Board guidelines.").

Case No. IPR2024-01360
Patent 7,645,473

Respectfully submitted,

Date: February 3, 2025

/Tate L. Tischner/
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Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), this is to certify that on this 3rd day of February, 2025, I caused to be served a true and correct copy of the foregoing **PATENT OWNER'S SUR-REPLY** by e-mail (as agreed in the Service Information section of the Petition):

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