

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

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SYNGENTA CROP PROTECTION AG,  
Petitioner,  
vs.  
UPL LTD.,  
Patent Owner.

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PGR2023-00017
U.S. Patent No. 11,445,727 B2

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Remote Teleconference Hearing Before  
SUSAN L. C. MITCHELL and MICHAEL A. VALEK  
Administrative Patent Judges

October 26, 2023  
2:00 p.m. EST

Denise M. Munguia, RDR, CRR, CRC, CLR  
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1 JUDGE VALEK: All right. This is a 14:00:21  
2 conference for PGR2023-00017. I'm Judge Valek, 14:00:22  
3 and Judge Mitchell is on the line with me. 14:00:29

4 Would counsel for both parties please 14:00:31  
5 introduce themselves, beginning with Petitioner? 14:00:33

6 MR. BUCCA: Thank you, Your Honor. This 14:00:37  
7 is Daniel Bucca with the law firm of 14:00:39  
8 BakerHostetler representing Petitioner Syngenta 14:00:41  
9 Corp. And also on the line is David Klecyngier, 14:00:46  
10 also with BakerHostetler, representing 14:00:53  
11 Petitioner. 14:00:55

12 JUDGE VALEK: Okay. And who do we have 14:01:02  
13 for Patent Owner? 14:01:04

14 MR. FELDSTEIN: Your Honor, this is Mark 14:01:06  
15 Feldstein from Finnegan Henderson. With me also 14:01:09  
16 on the line is my colleague Ken Guerra from 14:01:12  
17 Finnegan, and we should also have a court 14:01:12  
18 reporter on the line. 14:01:15

19 JUDGE VALEK: Okay. Can we ask you to 14:01:15  
20 file the transcript when it's ready, 14:01:21  
21 Mr. Feldstein? 14:01:23

22 MR. FELDSTEIN: Yes, Your Honor. Yes. 14:01:24

23 JUDGE VALEK: Thank you. 14:01:25

24 All right. We're here today to discuss 14:01:26  
25 the issues identified in Patent Owner's e-mail 14:01:28

4

1 dated October 23rd. The first issue is Patent 14:01:32  
2 Owner's assertion that Petitioner has only 14:01:35  
3 produced part of the data from the field books 14:01:37  
4 for the tests relied upon in Exhibit 1020 and 14:01:39  
5 that there is other data from -- for those tests 14:01:44  
6 that should be produced. 14:01:46

7 We'll hear from Patent Owner first, and 14:01:47  
8 where I would like you to begin, counsel, is 14:01:49  
9 would you begin by identifying the data from the 14:01:51  
10 field books that has been produced and then tell 14:01:55  
11 us what additional data Patent Owner contends 14:01:58  
12 still needs to be produced. 14:02:01

13 MR. FELDSTEIN: Yes, Your Honor. Again, 14:02:03  
14 this is Mark Feldstein. What we have from the 14:02:04  
15 field books, Petitioner produced on October 18th 14:02:07  
16 partial data related to severity. It did not 14:02:12  
17 include all the data for all the time periods 14:02:17  
18 that are reported to have been measured, 14:02:21  
19 including for 42 days and 49 days post growth, 14:02:25  
20 and then on yesterday we received a second 14:02:31  
21 production of partial additional severity data 14:02:36  
22 for some of the 42- and 49-week data, but still 14:02:42  
23 we do not have all the 49-, 42- and 49-week data. 14:02:46  
24 So that's what we do have. We have most, it 14:02:51  
25 seems, but not all of the severity data. 14:02:55

5

1           What we do not have any of is either           14:02:58  
2   toxicity data, defoliation data, yield data that   14:03:02  
3   are reported in the Prates declaration, Exhibit   14:03:07  
4   2010, as having been measured for all these time   14:03:12  
5   periods and that Mr. Prates, or Dr. Prates, as it   14:03:16  
6   may be, confirmed had been measured and were       14:03:19  
7   contained in the field books. We thought --       14:03:21  
8   that's what we had requested from Petitioner back   14:03:24  
9   a month ago, on October -- I mean, excuse me,       14:03:27  
10   September 25th, we had requested all the field     14:03:30  
11   book data, and we had understood that the two       14:03:32  
12   days later they had agreed to produce all the       14:03:36  
13   field book data. We seem to have maybe perhaps     14:03:38  
14   not have been in the agreement that we thought     14:03:44  
15   because, again, they have not produced the          14:03:46  
16   phytotoxicity, defoliation or yield data, and       14:03:49  
17   they have only produced part, it seems, of the       14:03:53  
18   severity data.                                       14:03:55

19           JUDGE VALEK: Okay. Mr. Feldstein, as I   14:03:58  
20   understand it, Petitioner's declarant used the       14:04:02  
21   severity data for the calculations that are in       14:04:08  
22   the declaration, for those control calculations,     14:04:10  
23   but it didn't -- he didn't use the other types of   14:04:14  
24   data you mentioned, phytotoxicity, I believe, and   14:04:17  
25   yield, and defoliation. Why do you believe that     14:04:23

6

1     you need those additional types of data, the     14:04:26  
2     defoliation, yield, phytotoxicity?     14:04:28

3             MR. FELDSTEIN: With respect to yield,     14:04:32  
4     for example, we have further testimony from their     14:04:34  
5     expert declarant, Dr. Brannen, that the bottom     14:04:36  
6     line, what you are looking for in terms of     14:04:39  
7     performance of a fungicide, is the yield data.     14:04:41  
8     The yield data is the bottom line, that's what     14:04:45  
9     the farmers care about, that's what's important,     14:04:48  
10    that's what we requested, including the other     14:04:50  
11    parameters, to be able to evaluate what we think     14:04:53  
12    is going to be data inconsistent with their     14:04:58  
13    representations, their arguments that the subject     14:05:00  
14    matter of the patent is obvious.     14:05:03

15            The phytotoxicity data is directly     14:05:06  
16    related, the phytotoxicity, defoliation and yield     14:05:09  
17    data are directly related to the tests that they     14:05:12  
18    conducted, they are part of the tests, they were     14:05:16  
19    in the field book data, we confirmed that with     14:05:19  
20    Mr. Prates, and that's what we had requested and     14:05:21  
21    we thought we had agreement on.     14:05:24

22            JUDGE VALEK: So it's your contention     14:05:28  
23    that there might be synergy shown for these other     14:05:31  
24    parameters; is that a way of characterizing what     14:05:35  
25    you're saying?     14:05:38

1 MR. FELDSTEIN: Benefits of some sort. 14:05:39

2 I don't know, synergy seems to maybe only refer 14:05:42

3 to phytotoxicity, but it's essentially, yes. 14:05:46

4 JUDGE VALEK: You said "phytotoxicity"? 14:05:49

5 Did you mean "severity" or -- 14:05:52

6 MR. FELDSTEIN: I apologize. I think 14:05:54

7 that the term, as it's used, at least in some 14:05:56

8 places, for synergy -- there's a specific 14:06:02

9 calculation that's used for synergy in some 14:06:07

10 regards and that goes to severity, but there can 14:06:09

11 be synergistic effects separate and apart for 14:06:12

12 yield, for example, or phytotoxicity, for 14:06:15

13 example, or defoliation. 14:06:18

14 JUDGE VALEK: Okay. 14:06:21

15 All right. Let's hear from the 14:06:24

16 Petitioner now. To begin with, is it correct 14:06:26

17 that Petitioner has only produced some of the 14:06:32

18 severity data and that there still remains 14:06:37

19 additional severity data that has not been 14:06:42

20 produced? 14:06:45

21 MR. BUCCA: That is incorrect. 14:06:45

22 JUDGE VALEK: Let's start with that. 14:06:46

23 MR. BUCCA: Thank you, Your Honor. This 14:06:46

24 is Dan Bucca for Petitioner. That is incorrect. 14:06:49

25 Petitioner has submitted, has provided Patent 14:06:51

8

1 Owner with all of the severity data. I heard 14:06:56  
2 Patent Owner say that there were some days 14:06:58  
3 missing. I believe he called them weeks. They 14:07:01  
4 are actually days. Like 42, day 42 and day 49. 14:07:03  
5 Not all of the trials went that far. And we did 14:07:08  
6 submit all the severity datas for the days that 14:07:14  
7 were collected. That was an initial tranche, and 14:07:18  
8 that data was the only data that was relied upon 14:07:22  
9 by the declarant in his calculation. There were 14:07:25  
10 a couple of extra days that were not provided in 14:07:28  
11 the first tranche. We submitted that, the extra 14:07:32  
12 days, yesterday, I believe, and so now we have 14:07:36  
13 completed all the severity data that was 14:07:41  
14 collected for this declaration. 14:07:43  
15 JUDGE VALEK: And just to be clear, you 14:07:47  
16 are not refusing to produce any of the severity 14:07:48  
17 data; to your knowledge, you have produced all 14:07:50  
18 that there is, correct? 14:07:53  
19 MR. BUCCA: Correct. Yes, Your Honor. 14:07:55  
20 JUDGE VALEK: Okay. All right. Now 14:07:56  
21 let's turn to this other types of data that are 14:07:57  
22 referenced in Exhibit 1020, the phytotoxicity, 14:08:01  
23 defoliation and yield data. Is it correct -- 14:08:06  
24 MR. BUCCA: Yes, Your Honor. 14:08:09  
25 JUDGE VALEK: -- that you are refusing 14:08:10

1 to produce that data at this point in time? 14:08:14

2 MR. BUCCA: That is correct, Your Honor. 14:08:16

3 JUDGE VALEK: And this is -- 14:08:16

4 MR. BUCCA: I can explain. 14:08:17

5 JUDGE VALEK: I'll let you in just a 14:08:18

6 second. I'm just trying to get a lay of the 14:08:20

7 land. 14:08:22

8 To be clear, this is data that's in 14:08:22

9 those field books for the same field tests, but 14:08:25

10 it's not data that your declarant has relied upon 14:08:28

11 for the calculations in Exhibit 1020; do I have 14:08:32

12 that right? 14:08:35

13 MR. BUCCA: Yes, Your Honor. 14:08:36

14 JUDGE VALEK: Okay. All right. Why 14:08:38

15 don't you explain your position about why you 14:08:39

16 don't think you need to produce that data. 14:08:41

17 MR. BUCCA: Yes, Your Honor. First and 14:08:43

18 foremost, it wasn't relied upon by the declarant. 14:08:47

19 The declaration was a simple experiment to see 14:08:51

20 whether synergy occurred with certain 14:08:55

21 combinations of fungicide as it relates to 14:08:57

22 disease control. The declarant, Dr. Prates, did 14:09:01

23 testify that, as Syngenta's normal testing 14:09:07

24 procedure, they do do the assessments of 14:09:11

25 phytotoxicity, defoliation and yield. But he 14:09:12

10

1 wasn't -- there's no description of it, he wasn't 14:09:16  
2 relying upon it. It is -- it's basically used 14:09:19  
3 for other purposes. And, you know, I don't, I 14:09:23  
4 don't -- so that's point number one, that it 14:09:28  
5 wasn't relied upon by the declarant. 14:09:31

6 The declarant also said that the -- that 14:09:34  
7 the phytotoxicity, defoliation and yield doesn't 14:09:42  
8 relate to synergy. He testified to that several 14:09:45  
9 times during his deposition. He also testified 14:09:48  
10 that the data for phytotoxicity, defoliation and 14:09:51  
11 yield correlated with his showing of a lack of 14:09:56  
12 synergy. So if there's any indication as to what 14:10:00  
13 this data shows, it doesn't support -- it's not 14:10:04  
14 helpful to Patent Owner. 14:10:09

15 JUDGE VALEK: Let me interrupt you for a 14:10:11  
16 second, counsel, on that point that you just 14:10:13  
17 made, and kind of push back a little. You're 14:10:14  
18 saying it's not helpful, your witness has said 14:10:18  
19 it's not helpful, but then you are refusing to 14:10:21  
20 disclose it to the other side so that they can 14:10:23  
21 test those opinions and testimony. That seems a 14:10:27  
22 little problematic, doesn't it? Why should they 14:10:30  
23 just take your word for it? 14:10:33

24 MR. BUCCA: Under the PTAB rules, they 14:10:35  
25 -- this is additional discovery. Number one. 14:10:40

1 They have to show good cause. They have to 14:10:42  
2 identify, have some level of evidence to show 14:10:45  
3 that there's some inconsistency. They don't have 14:10:48  
4 that. As I listened to Patent Owner, he's 14:10:52  
5 speculating as to what he thinks the data is 14:10:55  
6 going to show. So they don't meet the good cause 14:10:59  
7 standard, number one. 14:11:02

8 Number two, there's another -- a couple 14:11:03  
9 of other factors that weigh heavily against them. 14:11:05  
10 Another factor I consider to be rather probative 14:11:08  
11 is that Patent Owner has its own tests. The 14:11:11  
12 patent itself, the patent in question here, has 14:11:14  
13 conducted disease severity tests, it claims to 14:11:18  
14 have enhanced yield, and it also claims to 14:11:21  
15 have -- let's see -- phyto -- phytotoxicity 14:11:26  
16 information. So Patent Owner can get its own 14:11:33  
17 data. And, presumably, unless these are empty 14:11:36  
18 contentions in the patent, it already has its own 14:11:41  
19 data. It doesn't need our data. So that weighs 14:11:43  
20 against, I think, the Patent Owner heavily in 14:11:46  
21 terms of the rationale for why this additional 14:11:49  
22 discovery is warranted. 14:11:52

23 Another, another reason is that it is 14:11:54  
24 burdensome, Your Honor. These are -- as I 14:11:56  
25 explained during the hearing the first time 14:11:59

12

1 around, we misunderstood that the field books 14:12:01  
2 were not actually physical documents. It's a 14:12:04  
3 database. In order to extract this information, 14:12:08  
4 we would have to, I guess, virtually sit with our 14:12:12  
5 client and pull the -- pull the information out 14:12:16  
6 and then put it in a form that's useful and then 14:12:19  
7 produce it. That's going to take weeks. 14:12:23

8 JUDGE VALEK: Counsel, I mean the 14:12:30  
9 purpose of a database is to be queried. I mean 14:12:33  
10 it's storing data so that it can be retrieved. 14:12:36  
11 So I'm a little skeptical of the idea that it's 14:12:39  
12 too burdensome because it's not on paper and it's 14:12:45  
13 stored electronically that you are not able to 14:12:48  
14 get this information, particularly when you have 14:12:50  
15 already produced the data you do want to rely 14:12:52  
16 upon. 14:12:54

17 MR. BUCCA: Yes, that -- 14:12:57

18 JUDGE VALEK: And I think it's a little 14:12:58  
19 bit different, and I'm going to give you a chance 14:12:59  
20 to respond, I think it's a little bit different 14:13:02  
21 perhaps than some of the other disagreements the 14:13:06  
22 parties have about additional discovery because 14:13:07  
23 our rules also say that expert testimony that 14:13:09  
24 doesn't disclose the underlying facts or data is 14:13:12  
25 entitled to little weight. And why should it be 14:13:14

13

1 the case that Petitioner should be allowed to 14:13:17  
2 disclose only the portions of the data from the 14:13:19  
3 tests that it wants to rely upon while preventing 14:13:22  
4 Patent Owner from seeing the rest of the data 14:13:25  
5 from the same field tests? 14:13:27

6 MR. BUCCA: So the first point, the 14:13:31  
7 database, to be fair, the people who extract 14:13:33  
8 information from the database have full-time jobs 14:13:41  
9 and they have to schedule this in their -- you 14:13:43  
10 know, they have to schedule extracting this 14:13:46  
11 information, and we have to review it. The 14:13:49  
12 production we made took us about a week to do, 14:13:53  
13 and -- because it wasn't -- so I'll just leave it 14:13:55  
14 at that, and if you are asking us to produce 14:14:00  
15 three different categories of data, it would take 14:14:02  
16 weeks. 14:14:05

17 With respect to reliance on our 14:14:05  
18 declaration, all we did was try to reproduce the 14:14:10  
19 testing that was in the patent at issue. The 14:14:15  
20 testing of the patent at issue was only disease 14:14:20  
21 control and we should be entitled to rely on our 14:14:22  
22 testing of disease control that showed there 14:14:26  
23 wasn't any synergy. If Patent Owner wants to be 14:14:28  
24 put in evidence that yield is somehow unexpected, 14:14:34  
25 they should have to rely on their own data, not 14:14:37

14

1       ours. 14:14:42

2               JUDGE VALEK: Okay. Let's let Patent 14:14:46

3       Owner respond. 14:14:53

4               Mr. Feldstein, you can have time to 14:14:54

5       respond. 14:15:00

6               MR. FELDSTEIN: Thank you, Your Honor. 14:15:00

7       Yeah, I'm not sure there's too much to respond 14:15:01

8       to. I think I can put a little context in to the 14:15:05

9       volume of material. What we received in the 14:15:07

10       first production was ten pages on a PDF with 14:15:09

11       Excel charts, it was not voluminous material in 14:15:16

12       any way, and if they have the same type of data 14:15:19

13       for the other parameters, then that's another ten 14:15:23

14       pages of ten-row data charts. It's not a lot of 14:15:27

15       material we're asking for. 14:15:33

16               I think Your Honor's point about 14:15:34

17       Petitioner relying selectively on data is a 14:15:36

18       concern. I think that Petitioner should have 14:15:39

19       been producing all this material as routine in 14:15:41

20       discovery. And, again, back to the very 14:15:47

21       beginning, I apologize that we're here, but we 14:15:49

22       had asked for this information back more than a 14:15:51

23       month ago, it's reflected in Exhibit 3003, and 14:15:53

24       Syngenta said they would produce it, subject to a 14:16:00

25       protective order, and that was their only 14:16:04

15

1 condition, and they are walking it back now to 14:16:06  
2 not produce the data and, as you said, we 14:16:08  
3 shouldn't have to take their word for it that it 14:16:10  
4 doesn't help us. 14:16:12

5 JUDGE VALEK: Let me ask you, let me ask 14:16:15  
6 you a question, Mr. Feldstein, specifically about 14:16:17  
7 Petitioner's allegation that there is no synergy 14:16:20  
8 based upon the calculations of its declarant in 14:16:23  
9 Exhibit 1020. Is there any reason to believe 14:16:26  
10 that the additional data, and by additional data 14:16:29  
11 I'm referring to these other parameters, 14:16:31  
12 phytotoxicity, defoliation and yield, is there 14:16:33  
13 any reason to believe -- believe that that 14:16:36  
14 additional data could be relevant to their 14:16:38  
15 allegation that there's no synergy? 14:16:41

16 MR. FELDSTEIN: To their allegation that 14:16:44  
17 there's no synergy? I don't think that it -- 14:16:46  
18 well, I think what the data is going to show -- 14:16:51  
19 well, let me back up half a step. 14:16:55

20 The subject matter of the additional 14:16:57  
21 discovery motion that we filed was based on the 14:16:58  
22 fact that Syngenta was actually promoting these 14:17:02  
23 products within the claim, promoting them for use 14:17:06  
24 in Brazil, and that they had bases in terms of 14:17:08  
25 disease management to promote it to farmers. The 14:17:12

16

1 fact that they are promoting it to farmers 14:17:18  
2 suggests that there is benefit to the 14:17:20  
3 combination, and the benefits would be reflected 14:17:22  
4 presumably in one or more of defoliation, yield 14:17:26  
5 and phytotoxicity, so I think the data's going to 14:17:28  
6 show the benefits that their witness testified 14:17:32  
7 are there and the rationale behind Syngenta's 14:17:35  
8 promoting of it. So I think it's going to -- 14:17:40

9 JUDGE VALEK: What are those benefits 14:17:43  
10 relevant to in this proceeding? That's what I'm 14:17:46  
11 asking. Going back to the standard is that you 14:17:48  
12 have to show it's directly relevant to something 14:17:50  
13 in this proceeding. Right? That's what our 14:17:52  
14 rules say. So what is -- are those benefits 14:17:54  
15 relevant to in this proceeding? 14:17:57

16 MR. FELDSTEIN: They are going to be 14:17:59  
17 unexpected results created in copying, for 14:18:00  
18 example, they are going to be for obviousness and 14:18:03  
19 they are going to be enablement, in response to 14:18:06  
20 their enablement challenge. 14:18:12

21 JUDGE VALEK: Okay. And how would that 14:18:15  
22 show copying? I think you mentioned copying. I 14:18:17  
23 don't understand how the benefits of the tests 14:18:20  
24 they did in Brazil show that they copied your 14:18:23  
25 patent. 14:18:25

17

1 MR. FELDSTEIN: Well, they -- the 14:18:26  
2 witness admitted that they are marketing or 14:18:27  
3 promoting these, these formulations to farmers in 14:18:30  
4 Brazil. That's the copying aspect. I suppose 14:18:33  
5 that -- 14:18:37

6 JUDGE VALEK: Okay, but the additional 14:18:37  
7 data wouldn't go to -- we're talking over each 14:18:39  
8 other. Why don't you finish and then I'll talk. 14:18:41

9 MR. FELDSTEIN: I apologize. Right. 14:18:43  
10 What I was trying to say, and maybe I didn't say 14:18:45  
11 it well, is our motion for additional discovery 14:18:47  
12 relates to the copying, and the copying is 14:18:49  
13 apparently based on the benefits of the 14:18:52  
14 formulations. The benefits of those formulations 14:18:55  
15 will be reflected in the data that we're looking 14:18:58  
16 for, the phytotoxicity, defoliation and/or yield. 14:19:01

17 JUDGE VALEK: All right. I'm going to 14:19:10  
18 let the Petitioner -- we're going to let the 14:19:12  
19 Petitioner have a chance to, I guess, surreply to 14:19:14  
20 that and then we'll see if anyone else on the 14:19:19  
21 panel has questions, but why don't you take a 14:19:21  
22 moment to respond to that, Mr. Bucca. 14:19:24

23 MR. BUCCA: Yes, thank you, Your Honor. 14:19:27  
24 To answer your first question, whether the 14:19:28  
25 additional data of phytotoxicity, defoliation and 14:19:32

1 yield would contradict or supplement the disease 14:19:35  
2 control, the answer is no. And there's testimony 14:19:40  
3 by Dr. Prates that says so. And I don't believe 14:19:44  
4 Patent Owner actually answered that question, he 14:19:48  
5 immediately went into the motions that are 14:19:52  
6 pending before the Board about additional 14:19:54  
7 discovery. We filed our opposition, and I think 14:19:55  
8 we have good reason to -- for opposing the 14:20:00  
9 additional discovery. But if we're talking about 14:20:04  
10 this declaration and data and whether it needs, 14:20:08  
11 this additional data needs to be produced, I 14:20:11  
12 reiterate that it wasn't relied upon, the 14:20:14  
13 declarant said it wasn't relevant, he said that 14:20:17  
14 several times in his deposition, and it doesn't, 14:20:20  
15 it doesn't change his results in any way. So if 14:20:25  
16 Patent Owner wants additional discovery for yield 14:20:29  
17 and phytotoxicity, it presumably has it. 14:20:33  
18 And with respect to these additional 14:20:38  
19 discovery requests, as we put in our opposition 14:20:40  
20 motion, the Patent Owner has the law wrong. 14:20:45  
21 Copying requires that there is some evidence of 14:20:49  
22 copying a product, not generally copying a 14:20:52  
23 patent. There's also, you know, the reasons I 14:20:56  
24 described earlier, it's burdensome. They haven't 14:21:01  
25 even identified a base -- they don't have even a 14:21:05

1 threshold level of evidence to suggest, to show 14:21:12  
2 that whatever they are asking for is going to be 14:21:14  
3 helpful to them. It's all speculation. 14:21:16

4 JUDGE VALEK: Well, counsel, this is a 14:21:18  
5 little bit different, and I think, you know, and 14:21:19  
6 I'm not blaming you for this, I think we're kind 14:21:22  
7 of conflating the motion for additional discovery 14:21:24  
8 and this, this request for additional information 14:21:26  
9 from these field books because you, by submitting 14:21:30  
10 your declarant's testimony in Exhibit 1020, have 14:21:34  
11 affirmatively put these tests at issue. Right? 14:21:37  
12 You are relying on at least some of the data from 14:21:40  
13 these field tests, and the same declaration says 14:21:43  
14 that there's also these other assessments that 14:21:46  
15 were made as part of those experiments, and so 14:21:47  
16 you have put those tests at issue. And it's a 14:21:49  
17 little bit different as far as burden because 14:21:51  
18 it's not just asking you to cast a net into the 14:21:54  
19 well of information that may be in Brazil, this 14:21:58  
20 is a particular data source, these field books, 14:22:00  
21 it's a database, as I understand it, and you can 14:22:02  
22 query this database and retrieve this information 14:22:05  
23 just as you have the severity data. And so it's 14:22:08  
24 a little bit different, and so I don't want to 14:22:09  
25 conflate those two issues. And what you are 14:22:12

20

1 asking us to do is essentially limit the 14:22:14  
2 discovery to just the data that your expert's 14:22:19  
3 relied upon for his synergy calculations or lack 14:22:22  
4 of synergy calculations. I'm not -- and so it 14:22:27  
5 seems a little different. Right? 14:22:32

6 MR. BUCCA: Yes, Your Honor. I was, I 14:22:36  
7 was turning to responding to Patent Owner. I'll 14:22:38  
8 stick to -- 14:22:42

9 JUDGE VALEK: Certainly. 14:22:43

10 MR. BUCCA: -- what I said initially, 14:22:44  
11 and that is that the answer to your initial 14:22:46  
12 question, whether phytotoxicity, foliation and 14:22:48  
13 yield affects the declaration, the answer is no. 14:22:51

14 JUDGE VALEK: Okay. So there's no other 14:22:57  
15 questions from the panel. What I'd like you guys 14:23:04  
16 to do is, we're going to ask the parties stay on 14:23:06  
17 the line, Judge Mitchell and I will confer on a 14:23:08  
18 separate line, and then we'll come back. So give 14:23:12  
19 us just a moment, please. 14:23:14

20 MR. FELDSTEIN: Thanks, Your Honor. 14:23:18

21 JUDGE VALEK: Okay. Counsel, this is 14:24:47  
22 Judge Valek. We're back. Both sides still here? 14:24:49

23 MR. BUCCA: Yes, Your Honor. 14:24:54

24 MR. FELDSTEIN: Yes, Your Honor. 14:24:55

25 JUDGE VALEK: Okay. So we're going to 14:24:56

21

1 order Petitioner to produce the additional field 14:24:58  
2 book data that's referenced in Exhibit 1020. 14:25:01  
3 That's the percent phytotoxicity, percent 14:25:04  
4 defoliation, and yield data for the two tests 14:25:08  
5 that are described in that exhibit. We're going 14:25:13  
6 to issue an order putting all that in writing, of 14:25:17  
7 course. 14:25:20

8 What I would like to talk about a little 14:25:20  
9 bit now is the timing issue. Mr. Bucca, I 14:25:22  
10 understand what you told us before is this is 14:25:28  
11 going to take weeks. I don't think we have 14:25:30  
12 weeks, if we want to try and keep the schedule on 14:25:32  
13 track, and so why don't we talk, is there a more 14:25:36  
14 perhaps realistic timeline you can give us for 14:25:42  
15 the production of this additional information? 14:25:46

16 MR. BUCCA: I -- I would have to -- I 14:25:51  
17 don't know the schedule of the people on 14:25:53  
18 Syngenta's side. We -- you know, clearly we 14:25:56  
19 would get their attention as fast as possible. 14:26:00  
20 The data too is there's, you know, the 14:26:03  
21 underlying, you know, data measurements and then 14:26:08  
22 there's the averaging of that data, and it might 14:26:10  
23 be very -- it might be easier just to get the, 14:26:16  
24 you know, the data points, if you will. When we 14:26:19  
25 produced the severity data to Patent Owner, he 14:26:22

22

1 mentioned it was only ten pages, that was 14:26:29  
2 deliberate so it was easy for them to understand. 14:26:31  
3 So I'm a little bit at a loss as to how long. I 14:26:35  
4 would have to -- I would -- you know, as soon as 14:26:42  
5 we're off the phone, I'm going to contact the -- 14:26:44  
6 our contact at Syngenta and try to get his 14:26:50  
7 attention and try to get it done in a few 14:26:52  
8 business days. I mean that's -- I can't 14:26:55  
9 guarantee it's going to be a few business days, 14:26:58  
10 but that's what I'm going to aim for. 14:27:00  
11 JUDGE VALEK: Okay. What I -- what I'm 14:27:03  
12 hoping, counsel, and I completely appreciate that 14:27:06  
13 you don't understand exactly how long this would 14:27:08  
14 take at this point in time, but you know the 14:27:09  
15 timing, we have had -- I can see from the e-mail 14:27:12  
16 that you guys have had discussions about keeping, 14:27:16  
17 you know, these due dates that are coming up on 14:27:18  
18 schedule. I know that Patent Owner had thrown 14:27:20  
19 out moving due date one, the date for the 14:27:25  
20 response, to November 11th -- or November 9th. 14:27:30  
21 Did I get that right? 14:27:34  
22 MR. FELDSTEIN: November 9th, Your 14:27:36  
23 Honor. 14:27:38  
24 JUDGE VALEK: Yeah, but that was 14:27:39  
25 assuming that you would get the data in 14:27:40

23

1 relatively short order, I assume. Is that 14:27:42

2 correct? 14:27:44

3 MR. FELDSTEIN: That was. That is 14:27:45

4 correct. 14:27:46

5 JUDGE VALEK: All right. So that 14:27:46

6 doesn't sound unreasonable, provided that you can 14:27:47

7 produce the data. 14:27:54

8 How long, Patent Owner, do you think, I 14:27:55

9 know this is kind of a tough question since you 14:27:56

10 haven't seen it, but how long do you think you 14:27:58

11 will need to be able to get it to consider it for 14:28:00

12 your response? 14:28:05

13 MR. FELDSTEIN: We would like at least a 14:28:05

14 week, Your Honor, to be able to consider it with 14:28:07

15 our expert. 14:28:08

16 JUDGE VALEK: Okay. So I think that's 14:28:10

17 the timeline that we're going to be looking at, 14:28:13

18 that we'll be moving due date one to be a week 14:28:16

19 after, or five business days after the production 14:28:19

20 of the information, and then so, Mr. Bucca, you 14:28:22

21 know, that deadline is going to kind of depend 14:28:26

22 upon when you think you can get it to them, and 14:28:29

23 obviously the sooner you can get it to them, the 14:28:31

24 less we have to push the schedule, which could 14:28:34

25 potentially cut into, you know, the time for the 14:28:37

24

1 response -- or for the reply. So, you know, it's 14:28:40  
2 in your interest to get that data to them 14:28:42  
3 quickly, but I also understand that, you know, 14:28:46  
4 there may be problems actually retrieving that 14:28:47  
5 data that you need to discuss with your client. 14:28:49

6 So what we're going to say is that, you 14:28:52  
7 know, you should get on the phone with them, you 14:28:55  
8 should start trying to figure out these issues, 14:28:58  
9 because we are going to issue an order requiring 14:29:00  
10 this additional information from the field books 14:29:02  
11 to be produced, just those three additional 14:29:04  
12 parameters, since the severity data has been 14:29:07  
13 produced, as you say, and then if there are 14:29:09  
14 problems you think that would impact the 14:29:12  
15 schedule, this hypothetical schedule we proposed 14:29:15  
16 where due date one would be moved to November 9th 14:29:17  
17 because it's going to take you weeks or a 14:29:21  
18 significant period of time to produce this 14:29:24  
19 additional data, send us another e-mail and we'll 14:29:26  
20 get them back on the conference call and we can 14:29:28  
21 discuss that timing. 14:29:30

22 Do you think that'll -- is that a 14:29:33  
23 workable plan for right now, Mr. Bucca? 14:29:35

24 MR. BUCCA: I think so, Your Honor. 14:29:37  
25 Yes. I will say, if you will allow, one point 14:29:38

25

1 about the timing here, and if we're talking -- 14:29:43

2 JUDGE VALEK: Sure. 14:29:46

3 MR. BUCCA: -- about the data that's in 14:29:47

4 the Prates declaration, the Patent Owner has 14:29:49

5 known about this declaration since the petition 14:29:56

6 and they could have been asking for this 14:29:58

7 underlying data well before the 11th hour. 14:29:59

8 JUDGE VALEK: So certainly they could. 14:30:03

9 And, counsel, I don't think they are entirely to 14:30:07

10 blame. You know, our rules are pretty clear 14:30:10

11 about expert testimony and the need to disclose 14:30:12

12 the underlying facts or data, and I know you say 14:30:16

13 this data isn't relevant, but it is part of the 14:30:20

14 same tests, it's specifically identified in the 14:30:22

15 declarant's testimony, and he may not have relied 14:30:25

16 upon it, but if you are going to rely on some of 14:30:29

17 the data, it seems like you should also be 14:30:33

18 willing to disclose all of the data so the other 14:30:35

19 side has a chance to respond in full. And so our 14:30:37

20 rules talk about this being, you know, we have a 14:30:39

21 Rule 42.65, which is about expert testimony, 14:30:42

22 tests and data, there's also some statements 14:30:47

23 about this in our trial practice guide, all of 14:30:49

24 those things basically can be summarized as if 14:30:51

25 you want us to give weight to the testimony, you 14:30:54

26

1     probably need to disclose the data and the     14:30:57  
2     specifics of the test. And so this is in your     14:31:00  
3     interest, ultimately, to disclose the experiments     14:31:02  
4     in full.     14:31:05

5             So that's what -- I'll just leave it at     14:31:08  
6     that. You know, let's try to work out these     14:31:11  
7     issues so that we can, you know, address the     14:31:13  
8     merits of these arguments and not continue to     14:31:15  
9     fight about this aspect of the discovery. I also     14:31:19  
10    know that the briefing on the motion for     14:31:22  
11    additional discovery is now complete because we     14:31:27  
12    got the opposition last night, and so we'll try     14:31:29  
13    to turn around an order and a ruling on that in     14:31:34  
14    relatively short order as well. But -- so you     14:31:36  
15    should be expecting two orders, one on this, but     14:31:41  
16    we have already told you what we are going to say     14:31:43  
17    in it, and then we'll also get you that briefing     14:31:44  
18    in short order to try to move things along and     14:31:47  
19    keep everything on schedule, as best we can.     14:31:49

20            MR. BUCCA: Thank you, Your Honor. I     14:31:56  
21    appreciate the advice and the patience.     14:31:57

22            JUDGE VALEK: Does either, does counsel     14:32:01  
23    for either side have any questions before we     14:32:03  
24    adjourn for today?     14:32:05

25            MR. FELDSTEIN: Your Honor, this is Mark     14:32:06

27

1 Feldstein for Patent Owner. Just to make it 14:32:07

2 explicit, due date one is no longer October 30th, 14:32:10

3 Monday, correct? 14:32:15

4 JUDGE VALEK: Yes, it will not be 14:32:18

5 October 30th. Right now we're going to work with 14:32:20

6 November 9th being due date one, and that'll 14:32:23

7 change only if it seems like Patent Owner is not 14:32:27

8 going to -- or Petitioner is not going to be able 14:32:33

9 to produce this additional data at least five 14:32:36

10 business days before that deadline. 14:32:39

11 MR. FELDSTEIN: Thank you, Your Honor. 14:32:40

12 JUDGE VALEK: Okay. And like I said, 14:32:42

13 Mr. Bucca, if after speaking with your client 14:32:45

14 about these issues it seems like that's 14:32:47

15 unworkable, please send us an e-mail and we'll 14:32:49

16 get back on the call and we'll work out a 14:32:53

17 timeline that works for everybody. Okay? 14:32:56

18 MR. BUCCA: Thank you, Your Honor. I 14:32:57

19 appreciate that. 14:33:00

20 JUDGE VALEK: Okay. With that, we are 14:33:02

21 adjourned. Thank you both for your -- both sides 14:33:04

22 for your time. 14:33:07

23 MR. BUCCA: Thank you, Your Honor. 14:33:08

24 MR. FELDSTEIN: Thank you, Your Honor. 14:33:10

25 [Hearing adjourned at 2:33 p.m. EST] 14:33:13

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## CERTIFICATE OF REPORTER

I, Denise M. Munguia, RDR, CRR, CRC, CLR, California CSR #14033, Michigan CSR #15974, a Notary Public within and for the State of Ohio, the officer before whom the proceedings were taken, do hereby certify that the foregoing transcript is a true and accurate record of these proceedings; that said proceedings were taken in Stenotype notes by me on the 26th day of October, 2023, commencing at 2:00 p.m. EST and ending at 2:33 p.m. EST.

I further certify that present on behalf of Petitioner Syngenta Crop Protection AG were Daniel Bucca, Ph.D., Esq., and David M. Klecyngier, Esq., of BakerHostetler and on behalf of Patent Owner UPL Ltd. were Mark J. Feldstein, Esq., and Kenneth S. Guerra, Esq., of Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.

I further certify that I am not related to, nor associated with any of the parties or their attorneys, nor do I have any disqualifying interest, personal or financial, in the actions within.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at North Olmsted, Ohio, on this 26th day of October, 2023.



Denise M. Munguia, Notary Public  
Within and for the State of Ohio

My commission expires May 23, 2025.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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