

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SYNGENTA CROP PROTECTION AG,
Petitioner,

v.

UPL LTD,
Patent Owner.

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

**PETITIONER'S REPLY IN SUPPORT OF
MOTION TO EXCLUDE EVIDENCE**

I. INTRODUCTION

Pursuant to the Board’s Scheduling Order dated July 31, 2023, (Paper 9) Syngenta Crop Protection AG (“Petitioner”) submits the following reply in support of its motion to exclude certain opinions proffered by Dr. Jacobsen, the expert for Patent Owner, UPL Ltd (“UPL”). Dr. Jacobsen offered opinions that he is not competent to make and based on unreliable methodologies. Rather than responding to Petitioner’s arguments and facts, UPL’s opposition relies on a number of techniques designed not only to confuse and create misunderstanding or doubt, but also designed to avoid the facts and accountability of UPL.

II. ARGUMENT

A. Jacobsen admitted he is not qualified to opine as to public accessibility of Godoy

Unable to address the facts, UPL relies on misdirection and equivocation in its effort to avoid the fact that Dr. Jacobsen admitted in his deposition he had no experience, expertise, or education in library science including indexing and cataloging references for publication and he was not competent to testify in these areas. EX1043, 50:5-51:18. To avoid this issue, UPL attacks the credibility of Petitioner’s library expert Dr. Hall-Ellis. This is a strawman argument—and largely attorney argument. UPL’s only “support” to attack and criticize Dr. Ellis’ opinions is to refer to her work in an unrelated case. This is an attempt to redirect from the issue raised in Petitioner’s Motion to Exclude—Dr. Jacobsen’s

incompetence to proffer opinions as to whether Godoy was publicly accessible. In doing so, UPL ignores: (1) Dr. Jacobsen's admitted lack of expertise in library science, including testimony that he could not interpret library records, including the MARC or Dublin Core records attached to the Supplemental Hall-Ellis declaration (EX1022, ¶¶18-38; EX1043, 50:5-51:18, 61:12-65:22); and (2) that although Dr. Jacobsen was familiar with *ResearchGate* he failed to consider or address information provided by Dr. Hall-Ellis as to *ResearchGate* (EX1022, ¶¶42-48; EX1043, 66:1-67:10).

Finally, UPL asserts Dr. Jacobsen's opinions are admissible based on his general experience. Specifically, they argue Jacobsen's opinions are admissible under FRE 602 based on "personal knowledge of the matter" or FRE 701 based on testimony of a lay witness. This is without merit. Dr. Jacobsen's statement goes beyond "personal knowledge". See EX2020, ¶¶88-90. Moreover, there is no evidence in the record that Jacobsen has "personal knowledge" for his opinions on the indexing, searchability, or the publication of Godoy, or the exhibits cited at EX2020, paragraphs 88-89. See *United States v. Hoffner*, 777 F.2d 1423, 1425 (5th Cir.1985), which explains that FRE 602 and FRE 701 require a lay witness to have first-hand knowledge of the events he is testifying about. Rather the evidence is to the contrary. EX1043, 57:12-58:21.

B. Dr. Jacobsen's opinions as to unexpected results are unreliable.

Again, rather than address Petitioner's arguments regarding the exclusion of certain opinions of Jacobsen as to synergy and unexpected results, UPL again misdirects and deflects. First, UPL contends Petitioner did not timely or properly object to Jacobsen's opinions; these assertions are meritless. Petitioner timely objected and identified the grounds for its objections to Jacobsen's declaration (objecting to EX2020 under FRE 702, 401, 403) and with sufficient particularity (EX2020 fails to use reliable principles and methods, is irrelevant and confusing to the issues) pursuant to 37 C.F.R. § 42.64(b)(1). Paper 35.

UPL's next tactic is to accuse Petitioner of impropriety. However, nothing in the rules prohibits a party from referring to material in a Sur-Reply that is involved in demonstrating a party's expert testimony is unreliable and thus inadmissible.

Notably, and consistent with its avoidance of the facts, UPL:

- Fails to address the many material errors in Dr. Jacobsen's Declaration;
- Fails to address that there is no precedent for using a Colby ratio of less than 1 to define synergy;
- Fails to address that there is no precedent for applying Colby to, *inter alia*, defoliation or yield; and
- Fails to address Jacobsen's own admission that the data is wrong.

All of Jacobsen's methodology for synergy fails the reliability standard set forth in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579,593-94 (1993). In

particular: (i) there is no evidence that Dr. Jacobsen's unconventional methodology has ever been employed by any expert other than Dr. Jacobsen for this proceeding; and (ii) Dr. Jacobsen's unconventional synergy methodology has never been published, much less subject to peer review publication. In fact, Dr. Jacobsen admitted there is no precedent in the scientific literature to determine synergy of fungicides using a Colby ratio of less than 1 for synergy. EX1043, 191:8-192:18. Further, his methodology for determining synergy based on yield data has no scientific basis and he admitted that he was not aware of any scientific literature that determined synergy based on yield. EX1043, 278:17-279:2.

Dr. Jacobsen's methodology for determining unexpected results is further flawed since he never showed what would have been expected by the combination of fungicides. EX2020, ¶247-248. *Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC*, 683 F.3d 1356, 1363 (Fed. Cir. 2012) (unexpected results requires a showing the results were unexpected to significant degree beyond what was known).

C. Dr. Jacobsen's synergy determinations are riddled with errors.

UPL attempts to gloss over the numerous errors admitted by Dr. Jacobsen in determining synergy as merely "a transcription error". UPL offers only attorney argument for the "transcription error." Paper 51, 10 citing to Paper 46, 24.

However, Dr. Jacobsen admitted that in applying his methodology he committed numerous errors in his analysis, rendering his opinions with respect to synergy and

unexpected results unreliable. For example, Dr. Jacobsen admitted his calculations for defoliation included many errors, so much so that he was unable to determine which values in Table D, page 93, of his report were correct. EX1043, 250:21-251:18; 261:4-11; 263:16-264:9, 268:16-271:5, 274:10-276:12-278:14.

Additionally, Dr. Jacobsen admitted that his yield analysis, like his defoliation analysis, was riddled with errors. For example, he acknowledged that the calculated “expected” values using the Colby equation should be higher than the “observed” values for the individual fungicides. EX1043, 184:11-185:10, 290:13-291:3. Yet, as Dr. Jacobsen admitted, his calculated “expected” Colby values for yield were lower than the “observed” values for the individual fungicides. *Id.* at 291:4-15. When shown this error, Jacobsen admitted the yield data was wrong. *Id.* at 291:19-20. Dr. Jacobsen also was unable to identify which Colby formula he used in his yield analysis. *Id.* at 287:16-288:2. These admitted errors in Dr. Jacobsen’s analysis, which he was unable to explain and which UPL fails to address render his application of his methodology entirely unreliable.

For the foregoing reasons the Board should grant Petitioner’s Motion.

Date: April 2, 2024

Respectfully submitted,

/Toni-Junell Herbert/

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I hereby certify that on April 2, 2024, a copy of the foregoing PETITIONER’S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE was provided via email to the following:

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