

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KinderFarms LLC,
Petitioner

v.

Genexa Inc.,
Patent Owner

Case PGR2023-00051

U.S. Patent No. 11,617,795

**PETITIONER'S RESPONSE TO PATENT OWNER'S NOTICE
IDENTIFYING PETITIONER'S ALLEGEDLY IMPROPER REPLY
ARGUMENTS**

Petitioner's Response re. Patent Owner's Notice Identifying Allegedly Improper Reply Arguments.

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Striking a portion of a party's brief is considered "an exceptional remedy" that is "granted rarely." (Office Patent Trial Practice Guide, Nov. 2019 Ed., 84 Fed. Reg. 64,280). Reply argument or evidence may be excluded if it introduces a new obviousness theory or new evidence not addressed in the Petition. *Ericsson Inc. v. Intell. Ventures I LLC*, 901 F.3d 1374, 1379-1381 (Fed. Cir. 2018). However, exclusion is improper if the reply restates or expands on arguments from the Petition, responds to unanticipated argument or evidence in the Patent Owner's Response, or demonstrates "the knowledge that skilled artisans would bring to bear" when reviewing the prior art. 37 C.F.R. § 42.23(b), *Ericsson Inc.*, 901 F.3d at 1381 (Fed. Cir. 2018); *Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1380-81 (Fed. Cir. 2018). As detailed below, Genexa has not shown that any portion of Petitioners' Reply warrants striking as improper.

A. Reply arguments regarding a POSA's knowledge and skill are proper.

The Board should deny Genexa's request to strike arguments concerning a POSA's knowledge and skill in selecting an agave syrup with an appropriate viscosity and adjusting water content to achieve a desired formulation viscosity because it is not a new argument or evidence. (Reply, 11, lines 12-14, 19, lines 14-18, 20, lines 9-16, 21, lines 6-9). The Petition and Dr. Crowley both raised this point. (Pet., 4, fn.1, 15, lines 1-3; Ex. 1003, ¶¶52, 93). Even if the Board deems these sections new argument or evidence, they are proper for a reply brief. First, they address the knowledge a POSA would apply when reviewing the prior art.

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Second, they directly respond to Genexa's arguments that a POSA would not be motivated or have a reasonable expectation of success in combining FR458-Example 1 or WO742-Example IX with the viscosity ranges disclosed in the '4666 Patent and WO133. (POR, 47-49, 62-63). Petitioner could not have anticipated this argument because (1) the '795 Patent does not require a specific viscosity for agave syrup; (2) the Petition acknowledges different viscosities for agave syrup and a POSA's ability to select a viscosity appropriate for the desired use (Pet., 4 fn.1, 15, lines 1-3, Exs. 1030 Table 4 (212 cP) and 1031 (2560 cP)); and (3) the Petition maps the '795 Patent viscosity limitations to disclosures in the '4666 Patent and WO133, not the hypothetical viscosities of FR458-Example 1 or WO742-Example IX made with "erroneous" 212 cP agave syrup (Pet., 31-32, 57-58).

B. Reply arguments regarding a motivation to combine are proper.

Genexa's claim that portions of the reply addressing the motivation to combine the agave-syrup formulations taught by FR458 or WO742 with the viscosity ranges taught by WO133 and/or the '4666 Patent are new arguments that should be stricken is incorrect. (Reply, 2, lines 16-20, 4, lines 7-11). The Petition asserts that a POSA would be motivated to combine the *teachings of these references*, with a reasonable expectation of success, because they are all in the same field of art, address similar issues, and involve oral analgesic formulations using known ingredients. (Pet., 27-28, 54-55). The grounds cited in

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the Petition specifically rely on FR458 and WO742's teaching of agave-based oral analgesic formulations and WO133 and/or the '4666 Patents ***teachings of appropriate viscosity ranges for such formulations***. (Pet., 19, line 11 to 20, line 19, 24, lines 6-9, 25, lines 6-10, 26, lines 14-16, 31, line 9 to 32, line 2, 57, line 19 to 58, line 8). Even if considered new argument, these sections properly support the Petition's motivation to combine arguments and respond to Genexa's lack of motivation and reasonable expectation of success argument. *Supra* at 2.

C. The preferred active pharmaceutical ingredient (API) concentration ranges in FR458 and WO133 are not new evidence.

Genexa also wrongly seeks to strike portions of the reply referencing the preferred API concentration ranges in FR458 and WO133. (Reply, 17, lines 1-4, 18-19). This is not new argument or evidence. The Petition cites ¶136 of Dr. Crowley's expert declaration to support its argument that a POSA would have understood the API concentration ranges in WO133 and FR458 as overlapping with those in claims 5 and 6. (Pet., 34-35; Ex. 1003, ¶136). This paragraph of Dr. Crowley's declaration directly quotes sections of FR458 and WO133 that reference, *inter alia*, the narrower preferred API concentration ranges Genexa asserts are "never mentioned regarding claims 5-6." (Ex. 1003, ¶136). Even if considered new evidence or argument, these sections appropriately respond to Genexa's argument that the API concentration ranges disclosed in FR458 and WO133 are so broad they cannot be presumed to render obvious overlapping ranges in claims 5 and 6. (POR, 54, 65).

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2024, a copy of the attached
PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE was served by
electronic mail to the attorneys of record, at the following addresses:

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Dated: October 9, 2024

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