

IN THE SUPREME COURT OF THE UNITED STATES

App. No. _____

SPECIALTY FERTILIZER PRODUCTS, LLC,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

To the Honorable John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Petitioner Specialty Fertilizer Products, LLC, respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for 30 days to and including March 8, 2018. The Court of Appeals issued its opinion on November 8, 2017 (attached as App. 1a-5a). No petition for rehearing was filed. Absent an extension of time, the Petition would therefore be due on February 6, 2018. Petitioner is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

In support of this application, Petitioner states as follows:

I. Background

Petitioner Specialty Fertilizer Products, LLC (“SFP”) is the owner of all rights in U.S. Patent No. 6,210,459, issued to John Larry Sanders (“the Sanders patent”). The Sanders patent is generally directed to fertilizer granules containing carefully controlled amounts of acidifying agents, which give them a unique, localized acid microenvironment that increases the availability of micronutrients, while not altering the pH of the bulk soil surrounding the microenvironments. Thus, plants can absorb micronutrients in the low pH microenvironments, while simultaneously absorbing macronutrients from the bulk soil.

The Mosaic Company markets and sells a strikingly similar fertilizer product that produces microenvironments in the bulk soil. This product, marketed under the MicroEssentials® mark, is highly successful, reaching hundreds-of-millions, if not billions, of dollars in sales. Because Mosaic’s MicroEssentials® product is covered by the Sanders patent’s claims, SFP brought suit in federal district court, alleging patent infringement. That case was stayed, however, upon the filing of an initial reexamination by SFP, which was successfully concluded; that stay was further extended when Respondent, Shell Oil Company, filed a subsequent *inter partes* reexamination of the Sanders patent. Shell contended in the *inter partes* reexamination that the claims of the Sanders patent were obvious principally in view of a prior-art international patent application, PCT Publication No. WO/27571 to Stewart G. Bexton (“the Bexton PCT”). Although the Bexton PCT did not expressly disclose the carefully controlled amounts of acidifying agents and other features present in the Sanders patent’s claims, Shell sought to overcome this deficiency by submitting a declaration of one of its employees, Klaus Hutter (“the Hutter I declaration”). That declaration asserted that one skilled in the art would

understand that the claimed ranges were, in fact, disclosed in the Bexton PCT and/or other prior art references, and it provided various calculations allegedly supporting this conclusion.

SFP noted many errors in the calculations and other assertions in the Hutter I declaration, and thus sought to depose Shell's witness to press him on the basis for his calculations and ultimate conclusions. As the reexamination progressed, this need to cross-examine Mr. Hutter became even more pressing because it became clear via the reexamination panel's initial rejection that the panel was going to adopt the reasoning in the Hutter I declaration. Moreover, during the further course of the Shell reexamination, Shell submitted two other Shell employee declarations, a second by Mr. Hutter ("the Hutter II declaration") and one by Graeme Blair ("the Blair declaration"). Accordingly, SFP made repeated petitions to the Director of the Patent Office requesting it be allowed to depose Shell's declarants. But the Patent Office summarily denied SFP's requests, opining instead that there is no right to cross-examination in *inter partes* reexamination proceedings, notwithstanding the fact that Shell's witnesses were both interested and adverse to SFP.

Ultimately, the reexamination panel upheld the patentability of the claims. Yet on appeal the Patent and Trial Appeal Board ("the Board") reversed and reinstated the panel's initial rejection, which essentially parroted the Hutter I declaration. SFP asked the Board to reconsider, explaining that the Patent Office had violated SFP's rights by relying on the biased employees' declarations without affording SFP a chance to cross-examine the declarants. But the Board remained steadfast in its rejection, opining that under *Abbott Laboratories v. Cordis Corp.*, 710 F.3d 1318 (Fed. Cir. 2013), there is no right to cross-examination in *inter partes* reexamination proceedings. In so doing, the Board wholly refused to even consider the special facts of this case in a due process analysis.

SFP appealed the issue to the Federal Circuit, arguing before the Court of Appeals that the Board’s blanket rule is contrary to this Court’s precedents, which have held that that Due Process “is *not a technical conception* with a fixed content unrelated to time, place and circumstances,” but instead “is flexible and calls for such procedural protections *as the particular situation demands.*” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (emphasis added) (first quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); and then quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). But the Court simply affirmed the Board’s decision in a summary affirmance without opinion, declining to comment whatsoever on SFP’s due process arguments. *See* App. at 2a-3a; Fed. Cir. R. 36 (providing that the Court of Appeals may enter a judgment without opinion).

II. The Issues to be Presented in SFP’s Petition for Certiorari are Important

In its petition, SFP will argue that the Patent Office’s policy of foreclosing any type of cross-examination in reexamination proceedings without at least first considering the facts of the particular situation is contrary to this Court’s precedent in *Mathews* and its progeny, and thus violates patent owners’ due process rights. The issue is particularly compelling in the instant case in light of the important private party rights involved. SFP holds valuable personal property rights in the form of the Sanders patent. *See Abbott Labs.*, 710 F.3d at 1327 (explaining that patent rights are covered by the Due Process Clause). And there is no dispute that The Mosaic Company’s infringing MicroEssentials® products have had immense commercial success, resulting in hundreds-of-millions (perhaps even billions) of dollars in sales. Yet, SFP was stripped of its patent rights without the procedural protections mandated by the Due Process Clause—more particularly, without the ability to confront and cross-examine the biased and adverse witnesses arrayed against it.

Moreover, and notwithstanding that SFP's due process argument was one of first impression for the Federal Circuit, the Court of Appeals declined to address the argument whatsoever. Instead, the Court of Appeals simply affirmed the Board's decision by employing the expedient now used by the Court of Appeals in over half of the appeals from Patent Office decisions—affirming the Board's decision without opinion as allowed by its Rule 36.

This petition will thus present weighty due process considerations for the Court's review, a decision on which will have implications for every party to a reexamination proceeding before the Patent Office. More particularly, the petition will address whether and to what extent a party to a reexamination proceeding should be afforded the protections of the Due Process Clause. The petition will also address the propriety of the Court of Appeals' prevalent practice of affirming a Board's decision without opinion, seemingly in violation of 35 U.S.C. § 144 ("The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue to the Director its mandate *and opinion*, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case." (emphasis added)). Although a similar question has been presented to the Court in at least one other pending petition, *Celgard, LLC v. Matal*, No. 16-1526, this case presents the additional issue of whether such a procedure is proper in the face of weighty due process considerations.

III. Petitioner Requires More Time to Prepare its Petition

Unfortunately, Petitioner's counsel will not have the time necessary to appropriately address these important issues by the initial deadline for filing a petition for certiorari, February 6, 2018. Petitioner's counsel is currently involved with many pending litigations including

several appeals at the Federal Circuit. These other engagements have required extensive travel and preparation, leaving little time to prepare the petition in this matter.

Moreover, Petitioner's counsel is currently representing a petitioner in another pending petition for certiorari, *Nidec Motor Corporation v. Zhongshan Broad Ocean*, No. 17-751. Although the Briefs in Opposition for that matter were initially due on December 22, 2017, the Government asked for, and received, an extension to file its brief in opposition by January 22, 2018. That extension has the effect of requiring Petitioner's counsel to prepare and file a reply brief in that matter by early February, thus conflicting with the initial deadline for filing a petition for certiorari in this matter, February 6, 2018.

Additionally, SFP's lead counsel is semi-retired and has a full docket of matters he is personally handling, making it difficult for him to devote full attention to the anticipated petition.

Accordingly, Petitioner respectfully requests a 30-day extension to permit its counsel enough time to fully review the record below, research the relevant law, and prepare an appropriate petition addressing these important issues.

Dated: January 22, 2018

Respectfully submitted,



Scott R. Brown (srb@hoveywilliams.com)

Counsel of Record

John M. Collins (jcollins@hoveywilliams.com)

Christopher W. Dawson (cdawson@hoveywilliams.com)

Hovey Williams LLP

10801 Mastin Boulevard, Suite 1000

Overland Park, Kansas 66210

Telephone: (913) 647-9050

Counsel for Petitioner Specialty Fertilizer Products, LLC

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**NOTICE OF ENTRY OF
JUDGMENT WITHOUT OPINION**

JUDGMENT ENTERED: 11/08/2017

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the appellant in favor of the appellee under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

16-2347 - Specialty Fertilizer Products v. Shell Oil Company
United States Patent and Trademark Office, Case No. 95/002,388

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

SPECIALTY FERTILIZER PRODUCTS, LLC,
Appellant

v.

SHELL OIL COMPANY,
Appellee

**JOSEPH MATAL, PERFORMING THE FUNCTIONS
AND DUTIES OF THE UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY
AND DIRECTOR, U.S. PATENT AND TRADEMARK
OFFICE,**
Intervenor

2016-2347

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. 95/002,388.

JUDGMENT

JOHN M. COLLINS, Hovey Williams LLP, Overland
Park, KS, argued for appellant. Also represented by
SCOTT R. BROWN, MATTHEW B. WALTERS.

HENRY A. PETRI, JR., Polsinelli PC, Washington, DC, argued for appellee. Also represented by JASON W. BRYAN, Houston, TX.

PHILIP J. WARRICK, Office of the Solicitor, United States Patent and Trademark Office, Alexandria, VA, argued for intervenor. Also represented by NATHAN K. KELLEY, FARHEENA YASMEEN RASHEED, SCOTT WEIDENFELLER.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (MOORE, CHEN, and STOLL, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

November 8, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Questions and Answers

Petitions for Rehearing (Fed. Cir. R. 40)
and
Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)

Q. When is a petition for rehearing appropriate?

A. Petitions for panel rehearing are rarely successful because they most often fail to articulate sufficient grounds upon which to grant them. For example, a petition for panel rehearing should not be used to reargue issues already briefed and orally argued; if a party failed to persuade the court on an issue in the first instance, a petition for panel rehearing should not be used as an attempt to get a second “bite at the apple.” This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36. Such dispositions are entered if the court determines the judgment of the trial court is based on findings that are not clearly erroneous, the evidence supporting the jury verdict is sufficient, the record supports the trial court’s ruling, the decision of the administrative agency warrants affirmance under the appropriate standard of review, or the judgment or decision is without an error of law.

Q. When is a petition for hearing or rehearing en banc appropriate?

A. En banc decisions are extraordinary occurrences. To properly answer the question, one must first understand the responsibility of a three-judge merits panel of the court. The panel is charged with deciding individual appeals according to the law of the circuit as established in the court’s precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate duty of the court en banc is to set forth the law of the Federal Circuit, which merit panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a suggestion for rehearing en banc to be appropriate. In addition, the party seeking rehearing en banc must show that either the merits panel has failed to follow identifiable decisions of the U.S. Supreme Court or

Federal Circuit precedential opinions or that the merits panel has followed circuit precedent, which the party seeks to have overruled by the court en banc.

Q. How frequently are petitions for rehearing granted by merits panels or petitions for rehearing en banc accepted by the court?

A. The data regarding petitions for rehearing since 1982 shows that merits panels granted some relief in only three percent of the more than 1900 petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

En banc petitions were accepted less frequently, in only 16 of more than 1100 requests. Historically, the court itself initiated en banc review in more than half (21 of 37) of the very few appeals decided en banc since 1982. This sua sponte, en banc review is a by-product of the court’s practice of circulating every precedential panel decision to all the judges of the Federal Circuit before it is published. No count is kept of sua sponte, en banc polls that fail to carry enough judges, but one of the reasons that virtually all of the more than 1100 petitions made by the parties since 1982 have been declined is that the court itself has already implicitly approved the precedential opinions before they are filed by the merits panel.

Q. Is it necessary to have filed either of these petitions before filing a petition for certiorari in the U.S. Supreme Court?

A. No. All that is needed is a final judgment of the Court of Appeals. As a matter of interest, very few petitions for certiorari from Federal Circuit decisions are granted. Since 1982, the U.S. Supreme Court has granted certiorari in only 31 appeals heard in the Federal Circuit. Almost 1000 petitions for certiorari have been filed in that period.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR A WRIT OF CERTIORARI

There is no automatic right of appeal to the Supreme Court of the United States from judgments of the Federal Circuit. You must file a petition for a writ of certiorari which the Supreme Court will grant only when there are compelling reasons. (See Rule 10 of the Rules of the Supreme Court of the United States, hereinafter called Rules.)

Time. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this Court or within 90 days of the denial of a timely petition for rehearing. The judgment is entered on the day the Federal Circuit issues a final decision in your case. [The time does not run from the issuance of the mandate, which has no effect on the right to petition.] (See Rule 13 of the Rules.)

Fees. Either the \$300 docketing fee or a motion for leave to proceed in forma pauperis with an affidavit in support thereof must accompany the petition. (See Rules 38 and 39.)

Authorized Filer. The petition must be filed by a member of the bar of the Supreme Court of the United States or by the petitioner representing himself or herself.

Format of a Petition. The Rules are very specific about the order of the required information and should be consulted before you start drafting your petition. (See Rule 14.) Rules 33 and 34 should be consulted regarding type size and font, paper size, paper weight, margins, page limits, cover, etc.

Number of Copies. Forty copies of a petition must be filed unless the petitioner is proceeding in forma pauperis, in which case an original and ten copies of the petition for writ of certiorari and of the motion for leave to proceed in forma pauperis. (See Rule 12.)

Where to File. You must file your documents at the Supreme Court.

**Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000**

No documents are filed at the Federal Circuit and the Federal Circuit provides no information to the Supreme Court unless the Supreme Court asks for the information.

Access to the Rules. The current rules can be found in Title 28 of the United States Code Annotated and other legal publications available in many public libraries.