

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EVERGREEN THERAGNOSTICS, INC.,

Petitioner,

v.

ADVANCED ACCELERATOR APPLICATIONS S.A.,

Patent Owner.

Case PGR2021-00001

U.S. Patent No. 10,596,278

PRELIMINARY PATENT OWNER RESPONSE

Mail Stop Patent Board
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
FACTS	7
A. Radionuclide Cancer Therapy Prior to July 2018	7
1. Therapeutic Rationale.....	7
2. Problem of Stability.....	9
3. Advanced Accelerator Applications S.A.....	15
4. The Invention.....	15
5. Prosecution	16
B. Evergreen’s Petition	18
ARGUMENT.....	20
A. Evergreen Fails to Show That the Protocol Is Prior Art.....	20
1. Strosberg and Protocol Are Two Separate Documents.....	22
2. Evergreen Has Failed to Carry Its Burden of Proving the Protocol Is Prior Art	25
B. Evergreen Fails to Show That the Protocol Anticipates Any Claim.....	39
1. The Protocol Does Not Explicitly Disclose the Required Stability Characteristics.....	39
2. The Protocol Does Not Inherently Disclose the Required Stability Characteristics.....	46
C. Maus Was Overcome in Prosecution and Evergreen Presents Substantially the Same Arguments.....	52
1. Substantially the Same Art, and Substantially the Same Arguments Were Presented to the PTO	55
a) <i>Becton factor (a)</i>: the similarities and material differences between the asserted art and the prior art involved during examination and <i>Becton factor (b)</i>: the cumulative nature of the asserted art and the prior art evaluated during examination.....	55

b)	<i>Becton factor (d)</i> : the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art	56
2.	Evergreen Fails to Sufficiently Point Out Material Error by the PTO.....	57
a)	<i>Becton factor (c)</i> : the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection	57
b)	<i>Becton factor (e)</i> : whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art	60
c)	<i>Becton factor (f)</i> : the extent to which additional evidence and facts presented in the petition warrant reconsideration of the prior art or arguments	62
D.	Obviousness.....	66
1.	Evergreen’s Petition Improperly Multiplies Its Obviousness Grounds.	66
2.	Evergreen’s Petition Offers Only <i>Pro Forma</i> Statements Concerning Motivation to Combine.....	68
3.	Evergreen’s Putative Expert Is Not a Person of Ordinary Skill, Which Is a Team Including both Radiochemists and Individuals Skilled in Administering Radiopharmaceuticals.....	70
E.	Evergreen’s Contingent Enablement Argument Is Legally Incorrect, Internally Inconsistent, and Foreclosed by Its Admissions	74
F.	Evergreen’s Improper Dependency Argument Is Incorrect.....	76

TABLE OF AUTHORITIES

Cases	<u>Pages(s)</u>
<i>Adaptics Ltd. v. Perfect Co.</i> , IPR2018-01596, Paper 20 (PTAB Mar. 6, 2019).....	5, 6, 67, 68, 74
<i>Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GmbH</i> , IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020).....	53, 54, 61, 66
<i>Albaad Massuot Yitzhak, Ltd. v. Edgewell Pers. Care Brands, LLC</i> , IPR2017-00693, Paper 11 (July 17, 2017)	47, 50, 51
<i>Andersen Corp. v. Fiber Composites, LLC</i> , 474 F.3d 1361 (Fed. Cir. 2007)	42
<i>Apple, Inc. v. DSS Tech. Mgmt., Inc.</i> , IPR2015-00369, Paper 14 (PTAB Aug. 12, 2015).....	29, 30
<i>In re Bayer</i> , 568 F.2d 1357 (C.C.P.A. 1978).....	33
<i>Becton, Dickinson & Co. v. B. Braun Melsungen AG</i> , IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017)	53, 54, 62, 66
<i>Belden Inc. v. Berk-Tek LLC</i> , 805 F.3d 1064 (Fed. Cir. 2015)	69
<i>Bettcher Indus., Inc. v. Bunzl USA, Inc.</i> , 661 F.3d 629 (Fed. Cir. 2011)	46
<i>Blue Calypso, LLC v. Groupon, Inc.</i> , 815 F.3d 1331 (Fed. Cir. 2016)	21
<i>Bruckelmyer v. Ground Heaters, Inc.</i> , 445 F.3d 1374 (Fed. Cir. 2006)	22
<i>C.R. Bard, Inc. v. Medline Indus., Inc.</i> , IPR2015-00511, Paper 9 (July 15, 2015)	48
<i>C.R. Bard, Inc. v. U.S. Surgical Corp.</i> , 388 F.3d 858 (Fed. Cir. 2004)	42

<i>In re Clay</i> , 966 F.2d 656 (Fed. Cir. 1992)	63, 65
<i>Coalition for Affordable Drugs V, LLC, et. al. v. Biogen MA, Inc.</i> , IPR2015-01993, Paper 63 (PTAB Mar. 21, 2017).....	73
<i>Cordis Corp. v. Bos. Sci. Corp.</i> , 561 F.3d 1319 (Fed. Cir. 2009)	37
<i>In re Cronyn</i> , 890 F.2d 1158 (Fed. Cir. 1989)	32
<i>Crown Operations Int’l, Ltd. v. Solutia Inc.</i> , 289 F.3d 1367 (Fed. Cir. 2002)	49
<i>Edmund Optics, Inc. v. Semrock Inc.</i> , IPR2014-00583, Paper 9 (PTAB Sept. 19, 2014).....	67
<i>Eli Lilly & Co. v. Barr Labs., Inc.</i> , 251 F.3d 955 (Fed. Cir. 2001)	46
<i>Endo Pharm. Inc. v. Depomed, Inc.</i> , IPR2014-00653, Paper 12 (Sept. 29, 2014).....	52
<i>Evergreen Theragnostics, Inc. v. Advanced Accelerator Applications SA</i> , PGR2021-00002, Paper 2 (PTAB Oct. 2, 2020)	18, 19, 51
<i>Evergreen Theragnostics, Inc. v. Advanced Accelerator Applications SA</i> , PGR2021-00003, Paper 2 (PTAB Oct. 2, 2020)	7, 8, 18, 19
<i>Galderma Laboratories, L.P. v. Teva Pharmaceuticals USA, Inc.</i> , 799 F. App’x 838 (Fed. Cir. 2020)	46, 48, 50
<i>Gillette Co. v. Energizer Holdings, Inc.</i> , 405 F. 3d 1367 (Fed. Cir. 2005)	76
<i>In re Hall</i> , 781 F.2d 897 (Fed. Cir. 1986)	2, 21
<i>Homeland Housewares, LLC v. Whirlpool Corp.</i> , 865 F.3d 1372 (Fed. Cir. 2017)	38

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.