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 PGR2021-00003

U.S. Patent No. 10,596,276

PATENT OWNER'S AUTHORIZED SUR-REPLY

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

TABLE OF AUTHORITIES

Pages

Cases

Rules

Evergreen had the burden to establish the Protocol (Ex. 1012) as *prior* art in its petition. It has failed to carry that burden because, among other things, Evergreen cannot show the Protocol was more likely than not publicly accessible. Now admitting the Protocol is a separate document from Strosberg (Ex. 1011), Evergreen pivots to argue for the first time that Strosberg is a "research aid" for the Protocol. But Strosberg lacks any definite reference to the Protocol, nor does it have directions for one to follow to reach the Protocol. Evergreen's lawyers testify concerning "supplemental material" generally, without personal knowledge or foundation. Plus, this lawyer testimony ignores the contrary record facts previously highlighted.

Evergreen's assertion that it is "not disputed…that following the instruction of [Strosberg] led to the Protocol" is false: Patent Owner identified substantial contrary evidence. Strosberg only generically refers to a "protocol" providing two specific locations to two other documents: one found at the "clinicaltrial.gov" URL provided under the abstract, and the other found within the cited "Supplemental Appendix." Paper 6 at 55–57. Never does Strosberg refer explicitly to the Protocol. Strosberg neither provides a URL for it, nor describes it, nor how to get to it in any definite way. A "research aid" must "provide a skilled artisan with a sufficiently definite roadmap" which "is reasonably certain" to lead the artisan to the alleged prior art. *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1350 (Fed. Cir. 2016).

Cases illuminate what comprises such a definite roadmap. *See Cornell Univ.*

v. Hewlett-Packard Co., No. 01-CV-1974, 2008 WL 11274580, at *5–7 (N.D.N.Y. May 14, 2008) (article was a research aid where it explicitly cited the alleged prior art); *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378–79 (Fed. Cir. 2006) (patent was a research aid for its application to which it explicitly referred); *Incyte Corp. v. Concert Pharm., Inc.*, No. IPR2017-01256, Paper 119 at 17 (PTAB Apr. 8, 2019) (article was a research aid where it had "the precise website URL…link to the reference"). Strosberg provides no roadmap to the Protocol, and instead, points elsewhere by clearly referencing two other, different "protocols." Paper 6 at 55–57.

Tellingly, Evergreen offers no testimony that anyone used Strosberg in 2017 (one year prior to the Patent's priority date) to find the Protocol. *See Google LLC v. IPA Techs. Inc.*, No. IPR2018-00476, Paper 12 at 10 (PTAB Dec. 20, 2018) (affirming Moran was not a "research aid" because "no proof that the web address in Moran would have led to Cheyer"). Although given this chance on reply, Evergreen ignores the contrary facts Patent Owner set out: the Protocol cross-references Strosberg as if the Protocol was published after Strosberg; and the Protocol is marked confidential and may have been redacted. Paper 6 at 47–61.

Instead, Evergreen offers lawyer testimony attaching portions of emails it had with the NEJM long before its petition was filed. One attachment indicates some copying and pasting from emails ostensibly received from the NEJM staff. *See* Ex. A to Ex. 1037. This appears to be multiple hearsay and as such is unreliable. *See*

Fed. R. Evid. 802, 805; *see also Cisco Sys., Inc. v. Centripetal Networks, Inc.*, No. IPR2018-01506, Paper 10 at 7 (PTAB Oct. 7, 2019) (institution denied where cited evidence "is hearsay for the purpose of establishing…public [accessibility] and is not reliable evidence"); *Celltrion, LLC v. Biogen, Inc.*, No. IPR2017-01230, Paper 10 at 15–16 (PTAB Oct. 12, 2017). Evergreen's strategic decision to omit these materials from their petition should invoke a negative inference. Such omission is understandable, since these materials: lack personal knowledge and corroborating evidence; do not refer to the Protocol itself (as opposed to "supplemental material" generally); fail to say when the Protocol was posted; fail to address whether the Protocol was redacted, and if so when; and fail to explain why the cover page of the Protocol refers to the page numbers of Strosberg as if it was already published.

Evergreen's burden to prove the art it relies upon is *prior* remains Evergreen's alone. *See Fanduel, Inc. v. Interactive Games LLC*, 966 F.3d 1334, 1341–42 (Fed. Cir. 2020). Evergreen cites *In re Hall* but the mere undisputed lack of rebuttal there was of no moment while the court relied on evidence of "indexing, cataloging, and shelving of theses[.]" *In re Hall*, 781 F.2d 897, 897–99 (Fed. Cir. 1986). Evergreen admits it lacks such evidence here, pivoting now to a "research aid" theory, but lacks factual support necessary for a "definite roadmap." Through it all, Evergreen leaves unanswered the numerous conflicting record facts Patent Owner has highlighted.

Patent Owner respectfully requests denial of institution.

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