

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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PARSE BIOSCIENCES, INC.,  
Petitioner,

v.

10X GENOMICS, INC.,  
Patent Owner.

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Case No. IPR2023-00958  
U.S. Patent No. 10,697,013

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**PETITIONER'S OPPOSITION TO PATENT OWNER'S  
MOTION TO EXCLUDE**

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### PETITIONER’S UPDATED EXHIBIT LIST

| Exhibit # | Description                                                                                                                                                                                                                 |
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| EX1001    | U.S. Patent No. 10,697,013 (“the ’013 patent”)                                                                                                                                                                              |
| EX1002    | Declaration of Gregory Cooper, Ph.D.                                                                                                                                                                                        |
| EX1003    | PCT Patent Publication No. WO 2010/117620 to Linnarsson et al. (“Linnarsson”)                                                                                                                                               |
| EX1004    | Megan L McCloskey et al., <i>Encoding PCR Products with Batch-Stamps and Barcodes</i> , 45 Biochemical Genetics, 761-767 (2007) (“McCloskey”)                                                                               |
| EX1005    | Prosecution File History of U.S. Patent No. 10,697,013                                                                                                                                                                      |
| EX1006    | Leslie H. Brail et al., <i>Gene expression in individual cells: analysis using global single cell reverse transcription polymerase chain reaction (GSC RT-PCR)</i> , 406 Mutation Research Genomics, 45-54 (1999) (“Brail”) |
| EX1007    | Hubert Hug et al., <i>Measurement of Number of Molecules of a Single mRNA Species in a Complex mRNA Preparation</i> , 221 J. Theor. Bio., 615-624 (2003) (“Hug”)                                                            |
| EX1008    | Intentionally left blank.                                                                                                                                                                                                   |
| EX1009    | Gerald Schochetman et al., <i>Polymerase Chain Reaction</i> , 158 J. of Infectious Diseases 1154-1157 (1988) (“Schochetman”)                                                                                                |
| EX1010    | Intentionally left blank.                                                                                                                                                                                                   |
| EX1011    | H.C. Yang et al., <i>A genome-wide study of preferential amplification/hybridization in microarray-based pooled DNA experiments</i> , 34 Nucleic Acids Research 1-11 (2006) (“Yang”)                                        |
| EX1012    | Severine A Degrelle et al., <i>Amplification biases: possible difference among deviating gene expressions</i> , 9 BMC Genomics 1-15 (2008) (“Degrelle”)                                                                     |
| EX1013    | Brooks E. Miner et al., <i>Molecular barcodes detect redundancy and contamination in hairpin-bisulfite PCR</i> , 32 Nucleic Acids Research 1-4 (2004) (“Miner”)                                                             |

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| EX1014    | Intentionally left blank.                                                                                                                                                                                                                                         |
| EX1015    | U.S. Patent Provisional Application No. 61/164,759 (filed March 30, 2009) (Sven Linnarsson, applicant) (“Linnarsson Provisional”)                                                                                                                                 |
| EX1016    | Defendant 10X Genomic’s Opening Brief In Support Of Its Motion To Dismiss, <i>Becton, Dickinson and Company and Cellular Research, Inc. v. 10X Genomics, Inc.</i> , C.A. No. 18-1800-RGA (Mar. 1, 2019 D. Del (No. 19)                                            |
| EX1017    | Defendant 10X Genomic’s Reply Brief In Support Of Its Motion To Dismiss, <i>Becton, Dickinson and Company and Cellular Research, Inc. v. 10X Genomics, Inc.</i> , C.A. No. 18-1800-RGA (Apr. 12, 2019 D. Del.) (No. 22)                                           |
| EX1018    | Scheduling Order, <i>10X Genomics, Inc. and The Board of Trustees of the Leland Stanford Junior University v. Parse Biosciences, Inc.</i> , C.A. No. 22-1117-JHS (Mar. 2, 2023 D. Del (No. 48)                                                                    |
| EX1019    | Federal Judicial Caseload Statistics (2022), at <a href="https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics">https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics</a> |
| EX1020    | Curriculum Vitae of Gregory Cooper                                                                                                                                                                                                                                |
| EX1021    | Jonas Binladen et al., <i>The Use of Coded PCR Primers Enables High Throughput Sequencing of Multiple Homolog Amplification Products by 454 Parallel Sequencing</i> , 2(2): e197 PLoS ONE 1-9 (2007) (Binladen)                                                   |
| EX1022    | Intentionally left blank.                                                                                                                                                                                                                                         |
| EX1023    | Motion Success for Stay Pending IPR In Delaware District                                                                                                                                                                                                          |
| EX1024    | Hiroto Okayama and Paul Berg, <i>High-Efficiency Cloning of Full-Length cDNA</i> , 2 Molecular and Cellular Biology 161-170 (1982) (“Okayama”)                                                                                                                    |
| EX1025    | Bruce Alberts, et al., “Chapter 6 How Cells read the Genome: From DNA To Protein,” <i>Molecular Biology of the Cell</i> , Garland Science 299-335 (4th ed. 2002)                                                                                                  |

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| EX1026    | Assignment Record for U.S. Patent 8,298,767                                                                                                                                                                                                                                  |
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| EX1028    | Declaration of Sylvia D. Hall-Ellis, Ph.D.                                                                                                                                                                                                                                   |
| EX1029    | US Patent No. 8,835,358 B2                                                                                                                                                                                                                                                   |
| EX1030    | S. Clancy et al., <i>Translation: DNA to mRNA to Protein</i> , Nature Education (2008), at <a href="https://www.nature.com/scitable/topicpage/translation-dna-to-mrna-to-protein-393/">https://www.nature.com/scitable/topicpage/translation-dna-to-mrna-to-protein-393/</a> |
| EX1031    | Cole Trapnell, <i>Defining cell types and states with single-cell genomics</i> , 25(10) Genome Research 1491-1498 (2015) (“Trapnell”)                                                                                                                                        |
| EX1032    | Gerard Brady et al., <i>Representative in Vitro cDNA Amplification From Individual Hemopoietic Cells and Colonies</i> , 2 Methods in Molecular and Cellular Biology 17-25 (1990) (“Brady”)                                                                                   |
| EX1033    | James Eberwine et al., <i>Analysis of gene expression in single live neurons</i> , 89 Proc. Natl. Acad. Sci. 3010-3014 (1992) (“Eberwine”)                                                                                                                                   |
| EX1034    | Maria de Fatima Bonaldo et al., <i>Normalization and Subtraction: Two Approaches to Facilitate Gene Discovery</i> , 6(9) Genome Research 791-806 (1996) (“Bonaldo”)                                                                                                          |
| EX1035    | Sydney Brenner et al., <i>In vitro cloning of complex mixtures of DNA on microbeads: Physical separation of differentially expressed cDNAs</i> , 97.4 Proceedings of the Nat’l Academy of Sci. 1665-1670 (2000) (“Brenner”)                                                  |
| EX1036    | David H. Persing, <i>Polymerase Chain Reaction: Trenches to Benches</i> , J. of Clinical Microbiology 1281-1285 (1991) (“Persing”)                                                                                                                                           |
| EX1037    | Kazuki Kurimoto et al., <i>An improved single-cell cDNA amplification method for efficient high-density oligonucleotide microarray analysis</i> , 34(5) Nucleic Acids Research 1-17 (2006) (“Kurimoto”)                                                                      |
| EX1038    | Shigeyuki Esumi et al., <i>Method for single-cell microarray analysis and application to gene-expression profiling of GABAergic neuron progenitors</i> , 60 Neuroscience Research 439-451 (2008) (“Esumi”)                                                                   |

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| EX1039    | Y. Shibata et al., <i>Cloning Full-length, Cap-Trapper-Selected cDNAs by Using the Single-Strand Linker Ligation Method</i> , 30(6) Biotechniques 1250-1254 (2001) (“Shibata”)                                                                                                                                                                                   |
| EX1040    | U.S. Patent Application 2004/0166499                                                                                                                                                                                                                                                                                                                             |
| EX1041    | Athina Gkazi, <i>An Overview of Next-Generation Sequencing</i> , Technology Networks Genomics Research at Figure 2 (March 17, 2021) at <a href="https://www.technologynetworks.com/genomics/articles/an-overview-of-next-generation-sequencing-346532">https://www.technologynetworks.com/genomics/articles/an-overview-of-next-generation-sequencing-346532</a> |
| EX1042    | Rami Sukarieh, <i>Relocalization of eIF4E by its binding partners upon stress</i> , Figure 2 (August 2009) at <a href="https://www.researchgate.net/publication/41663010_Relocalization_of_eIF4E_by_its_binding_partners_upon_stress">https://www.researchgate.net/publication/41663010_Relocalization_of_eIF4E_by_its_binding_partners_upon_stress</a>          |
| EX1043    | Clyde A. Hutchinson, <i>DNA sequencing: bench to bedside and beyond</i> , 35(18) Nucleic Acids Research 6227-6237 (2007) (“Hutchinson”)                                                                                                                                                                                                                          |
| EX1044    | Beáta G Vértessy and Judit Tóth, <i>Keeping Uracil Out of DNA: Physiological Role, Structure and Catalytic Mechanism of dUTPases</i> , Acc Chem Res. 1-20 (2009) (“Vértessy”)                                                                                                                                                                                    |
| EX1045    | Elaine R. Mardis, <i>Next-Generation DNA Sequencing Methods</i> , 9 Annual Review Genomics and Human Genetics 387-402 (2008) (“Mardis”)                                                                                                                                                                                                                          |
| EX1046    | Jay Shendure and Hanlee Ji, <i>Next-Generation DNA Sequencing</i> , 26(10) Nature Biotechnology 1135-1145 (2008) (“Shendure”)                                                                                                                                                                                                                                    |
| EX1047    | Elaine R. Mardis, <i>The impact of next-generation sequencing technology on genetics</i> , 24(3) Trends in Genetics 133-141 (2008) (“Mardis 2”)                                                                                                                                                                                                                  |
| EX1048    | Robert A. Holt and Steven J.M. Jones, <i>The new paradigm of flow cell sequencing</i> , 18(6) Genome Research 839-846 (2008) (“Holt”)                                                                                                                                                                                                                            |
| EX1049    | National Human Genome Research Institute, <i>Nucleotide</i> (March 21, 2023) at <a href="https://www.genome.gov/genetics-glossary/Nucleotide">https://www.genome.gov/genetics-glossary/Nucleotide</a>                                                                                                                                                            |
| EX1050    | National Human Genome Research Institute, <i>Polymerase Chain Reaction</i> (March 21, 2023) at <a href="https://www.genome.gov/genetics-glossary/Polymerase-Chain-Reaction">https://www.genome.gov/genetics-glossary/Polymerase-Chain-Reaction</a>                                                                                                               |

| Exhibit # | Description                                                                                                                                                                                                                                    |
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| EX1051    | Plaintiffs, Becton, Dickinson and Company and Cellular Research, Inc.’s First Amended Complaint, <i>Becton, Dickinson and Company and Cellular Research, Inc. v. 10X Genomics, Inc.</i> , C.A. No. 18-1800-RGA (Feb 08, 2019 D. Del.) (No. 15) |
| EX1052    | Exhibits 26 and 27 attached with Plaintiffs’ First Amended Complaint, <i>Becton, Dickinson and Company and Cellular Research, Inc. v. 10X Genomics, Inc.</i> , C.A. No. 18-1800-RGA (Feb 08, 2019 D. Del.) (No. 15-3)                          |
| EX1053    | US 9,708,659 B2                                                                                                                                                                                                                                |
| EX1054    | Georgi K. Marinov et. al, <i>From single-cell to cell-pool transcriptomes: Stochastically in gene expression and RNA splicing</i> , 24.3 Genome Research 496-510 (2014) (“Marinov”)                                                            |
| EX1055    | United States Patent Application Publication to McCloskey et al. (“McCloskey II”)                                                                                                                                                              |
| EX1056    | Boris Hollas and Rainer Schuler, <i>A Stochastic Approach to Count RNA Molecules Using DNA Sequencing Methods</i> , 2812 Algorithms in Bioinformatics 55-62 (2003) (“Hollas”)                                                                  |
| EX1057    | Intentionally left blank.                                                                                                                                                                                                                      |
| EX1058    | Intentionally left blank.                                                                                                                                                                                                                      |
| EX1059    | Intentionally left blank.                                                                                                                                                                                                                      |
| EX1060    | Reinhard Stöger, <i>Epigenetics and Obesity</i> , 9(12) Pharmacogenomics 1851-1860 (2008) at <a href="https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2652025/">https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2652025/</a> (“Stöger”)              |
| EX1061    | Diane P. Genereux et. al, <i>Errors in the Bisulfite Conversion of DNA: Modulating Inappropriate- and Failed-Conversion Frequencies</i> , 36 Nucleic Acids Research 1-19 (2008) (“Genereux”)                                                   |
| EX1062    | Pierre Nicolas et. al., <i>The Stem Cell Population of the Human Colon Crypt: Analysis via Methylation Patterns</i> , 3 Plos Computational Biology 0364-0374 (2007) (“Nicolas”)                                                                |

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| EX1063    | "Using Multiplex Identifier (MID) Adaptors for the GS FLX Titanium Chemistry Basic MID Set" Genome Sequencer FLX System, Technnical Bulletin 004-2009, (Apr. 1, 2009) pp. 1-7.<br><a href="http://454.com/downloads/my454/documentation/technicalbulletins/TCB-09004%20Using%20MultiplexIdentifierAdaptorsForTheGSFLXTitaniumSeriesChemistry-BasicMIDSet.pdf">http://454.com/downloads/my454/documentation/technicalbulletins/TCB-09004 Using MultiplexIdentifierAdaptorsForTheGSFLXTitaniumSeriesChemistry-BasicMIDSet.pdf</a> . |
| EX1064    | Transcript of the deposition of Gregory Cooper, Ph.D., taken on December 20, 2023, in <i>Parse Biosciences, Inc. v. 10x Genomics, Inc.</i> , Case IPR2023-00876                                                                                                                                                                                                                                                                                                                                                                   |
| EX1065    | Declaration of Edward R. Reines in support of pro hac vice motion                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| EX1066    | <i>In re Reines</i> Federal Circuit decision, 14-MA0004                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| EX1067    | Personal Statement of Edward R. Reines, Fed. Cir. 14-MA004                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| EX1068    | Opinion, <i>10X Genomics, Inc. and The Board of Trustees of the Leland Stanford Junior University v. Parse Biosciences, Inc.</i> , C.A. No. 22-1117-JHS (May 2, 2024 D. Del (No. 209)                                                                                                                                                                                                                                                                                                                                             |
| EX1069    | Transcript of the deposition of John Quackenbush, Ph.D., taken on June 26, 2024, in <i>Parse Biosciences, Inc. v. 10x Genomics, Inc.</i> , Case IPR2023-00958                                                                                                                                                                                                                                                                                                                                                                     |
| EX1070    | Declaration of Gregory Cooper, Ph.D.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| EX1071    | Transcript of the deposition of John Quackenbush, Ph.D., taken on February 28, 2024, in <i>Parse Biosciences, Inc. v. 10x Genomics, Inc.</i> , Case IPR2023-00876                                                                                                                                                                                                                                                                                                                                                                 |
| EX1072    | Joint Claim Construction Brief, <i>10X Genomics, Inc. and The Board of Trustees of the Leland Stanford Junior University v. Parse Biosciences, Inc.</i> , C.A. No. 22-1117-JHS (December 7, 2023 D. Del) (No. 104)                                                                                                                                                                                                                                                                                                                |
| EX1073    | NEBcutter, <a href="https://nc3.neb.com/NEBcutter/prj/pz62Y3ZH7vX-03Y95_Unnamed">https://nc3.neb.com/NEBcutter/prj/pz62Y3ZH7vX-03Y95_Unnamed</a>                                                                                                                                                                                                                                                                                                                                                                                  |
| EX1074    | Mary Ann Moran et. al, <i>Sizing up metatranscriptomics</i> , The ISME Journal (2013) 7, 237-243                                                                                                                                                                                                                                                                                                                                                                                                                                  |

| Exhibit # | Description                                                                                                                                                                                                                                     |
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| EX1075    | Philip Ball, <i>Smallest genome clocks in at 182 genes</i> , Nature (October 12, 2006) doi:10.1038/news061009-10                                                                                                                                |
| EX1076    | Jose E. Perez-Ortin et. al, <i>A genomic view of mRNA turnover in yeast</i> , Academie des Sciences (2011) doi:10.1016/j.crv.2011.05.013                                                                                                        |
| EX1077    | U.S. Patent No. 10,240,197 (the “197 patent”)                                                                                                                                                                                                   |
| EX1078    | Intentionally left blank.                                                                                                                                                                                                                       |
| EX1079    | Excerpts from Opening Expert Report of John Quackenbush, Ph.D., <i>10X Genomics, Inc. and The Board of Trustees of the Leland Stanford Junior University v. Parse Biosciences, Inc.</i> , C.A. No. 22-1117-JHS (May 17, 2024 D. Del)            |
| EX1080    | BtsCI, NEB, <a href="https://www.neb.com/en-us/products/r0647-bts-ci">https://www.neb.com/en-us/products/r0647-bts-ci</a>                                                                                                                       |
| EX1081    | Transcript of the deposition of Gregory Cooper, Ph.D., taken on May 2, 2024, in <i>Parse Biosciences, Inc. v. 10x Genomics, Inc.</i> , Case IPR2023-00876                                                                                       |
| EX1082    | Nilima Sarkar, <i>Polyadenylation of mRNA in Prokaryotes</i> , Annu. Rev. Biochem. (1997), 66:173-97                                                                                                                                            |
| EX1083    | Shimyn Slomovic et. al, <i>RNA Polyadenylation in Prokaryotes and Organelles; Different Tails Tell Different Tales</i> , Critical Reviews in Plant Sciences (2006), 25:65-77 doi:10.1080/07352680500391337                                      |
| EX1084    | Excerpts from Redacted Rebuttal Expert Report of John Quackenbush, Ph.D., <i>10X Genomics, Inc. and The Board of Trustees of the Leland Stanford Junior University v. Parse Biosciences, Inc.</i> , C.A. No. 22-1117-JHS (June 14, 2024 D. Del) |
| EX1085    | Declaration of Sylvia D. Hall-Ellis, Ph.D., dated April 17, 2023 and filed as Exhibit 1065 on March 29, 2024, in <i>Parse Biosciences, Inc. v. 10x Genomics, Inc.</i> , Case IPR2023-00876                                                      |
| EX1086    | U.S. Patent No. 7,544,473                                                                                                                                                                                                                       |
| EX1087    | U.S. Patent No. 7,393,665                                                                                                                                                                                                                       |

| Exhibit # | Description                                                                                                                                                                     |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| EX1088    | Stipulation and [Proposed] Order regarding Invalidity Defenses, <i>10x Genomics, Inc. v. Parse Biosciences, Inc.</i> , C.A. 1:22-cv-01117-JHS, D.I. 248 (D. Del. Aug. 22, 2024) |
| EX1089    | Electronic notification confirming receipt of filing of Stipulation and [Proposed] Order regarding Invalidity Defenses, D.I. 248, dated August 22, 2024                         |
| EX1090    | Declaration of Sylvia D. Hall-Ellis, Ph.D.                                                                                                                                      |

## I. INTRODUCTION

Petitioner opposes Patent Owner's Motion to Exclude (Paper 36) the Declaration of Dr. Sylvia Hall-Ellis (EX1085) and the McCloskey reference (EX1004). Patent Owner's motion should be denied for the simple reason that the Board has already held that "Petitioner has shown that McCloskey is a printed publication as of 2007 and, thus, prior art..." *See Parse Biosciences, Inc., v. 10x Genomics, Inc.*, IPR2023-00876, Paper 47, 18-20 (P.T.A.B. Sept. 17, 2024). Patent Owner never attempts to rebut the Board's holding. This silence is confirmation enough that McCloskey is prior art and should not be excluded.

The Board's acknowledgment of McCloskey's status as prior art renders Patent Owner's request to exclude Dr. Hall-Ellis's declaration moot. Nevertheless, Patent Owner's only challenge to the declaration is that it is allegedly "untimely" because it was submitted on reply. Paper 38 at 3. Patent Owner, however, never raised a clear objection to the prior art status of McCloskey until its Patent Owner's Response. Paper 21 at 20-21. To the extent Patent Owner had made any prior objections to McCloskey, they were included only among a slew of vague boilerplate objections to a laundry list of documents and did not state a clear objection to its prior art status. Paper 12 at 1-3. While Patent Owner had made unambiguous objections that *some* documents were not prior art, it made no such clear objection to McCloskey. *Id.* It was thus wholly appropriate for Petitioner to address Patent

Owner's objection that McCloskey was not prior art in its reply via the Hall-Ellis declaration. As a Precedential Opinion Panel of this tribunal has made clear that "if a patent owner challenges a reference's status as a printed publication, *a petitioner may submit a supporting declaration with its reply.*<sup>1</sup>" *See Hulu v. Sound View*, IPR2018-01039, Paper 29, 15 (P.T.A.B. Dec. 20, 2019) (precedential).

## II. BACKGROUND

The McCloskey reference is a peer-reviewed journal article published in the December 2007 issue of the Biochemical Genetics journal. The McCloskey reference was available online through the reputable publisher Springer Science + Business Media, LLC on October 23, 2007. EX1085.054; EX1004.001. Petitioner relies upon McCloskey as part of a combination for Grounds 1-3, collectively rendering all claims of the '197 Patent obvious. *See* Paper 1.

Patent Owner failed to challenge, or even address, any argument about McCloskey's status as prior art in its Preliminary Response to the Petition filed on September 15, 2023. *See* Paper 6. In fact, it repeatedly refers to "the prior art [substance/teachings] of McCloskey." *See generally* Paper 6 at 3-4, 9-11.

Subsequently, when it filed its initial objections to the Petition under 37 C.F.R. §42.64 on February 15, 2024, it did not include a clear challenge

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<sup>1</sup> Emphasis supplied unless otherwise noted.

McCloskey's status as prior art. Paper 12. Rather, it lumped McCloskey (EX1004) together with over 40 exhibits in a laundry list of boiler plate objections based on FRE 901 (authentication), FRE 602 (personal knowledge), FRE 801 (hearsay), and FRE 401/402/403 (relevance). *Id.* at 1-3. None of these objections explained, much less identified, with any sufficient particularity a challenge to McCloskey's prior art status. *Id.* While Patent Owner explicitly alleged that Petitioner "failed to establish the prior art status" of EX1031, EX1041, EX1050, and EX1054, it did not include McCloskey in the list. *Id.* at 2.

It was not until Patent Owner's Response filed on May 3, 2024 that the Patent Owner first challenged McCloskey's prior art status and put the Petitioner on notice about the objection for the first time. *See* Paper 21 at 20-21. There, Patent Owner explicitly alleged for the first time that "Petitioner failed to establish McCloskey is, in fact, prior art to '013." *Id.*

Thus, in response to the POR on August 2, 2024, Petitioner submitted a supporting declaration of Dr. Sylvia Hall-Ellis further confirming the prior art status of the McCloskey reference. *See* Paper 27 at 4-5; EX1085. At no point has Patent Owner challenged the substance of Dr. Hall-Ellis's declaration, nor did Patent Owner seek to depose Dr. Hall-Ellis. Now, months later, Patent Owner moves to exclude Dr. Hall-Ellis's declaration and the McCloskey reference because they

“failed to establish McCloskey was publicly accessible prior to the priority date of the ’013 Patent,” still without challenging the substance of either document confirming that McCloskey is prior art. Paper 38 at 1.

### **III. ARGUMENT**

#### **A. The Board Has Held McCloskey Is A Prior Art Printed Publication**

Patent Owner challenges McCloskey as supposedly “irrelevant” because the publication date “appearing within McCloskey is hearsay,” and because McCloskey and Hall-Ellis Declaration “failed to establish McCloskey was publicly accessible prior to the priority date of the ’013 Patent.” *Id.* at 1, 4-5. These arguments are identical to those made by the Patent Owner in related IPR2023-00876, which the Board found to be “not persua[sive].” *Parse Biosciences*, Paper 47 at 18. Rather, the Board held that “there is *ample evidence* in the record demonstrating that McCloskey is a prior art printed publication.” *Id.* Patent Owner’s motion simply mimics its motion to exclude from IPR2023-00876 and fails to address the Board’s extensive rationale behind denying the exclusion of McCloskey, including numerous conventional markers of publication and corroboration of publication through several other references. As the Board held, none of the law cited by Patent Owner supports exclusion on the facts here. *Id.*

#### **1. McCloskey Bears Clear Conventional Markers Of Publication**

To begin, the Board agreed with Petitioner that McCloskey is properly

considered because it bears all conventional markers of publication. *Id.* at 18-20; *see also Trend Micro Inc. v. Cupp Computing AS*, IPR2019-00803, Paper 29, 9 (P.T.A.B. Sept. 15, 2020) (“Especially when dealing with documents from recognized sources, such as these, and following the lead of the Federal Circuit” the Board considers “external indicia of publication as proof” on the issues of publication date and accessibility.). Specifically, the Board noted the extensive indicia of publication that appear on the face of McCloskey:

McCloskey itself states: “Received: 31 January 2007 / Accepted: 29 May 2007 / Published online: 23 October 2007.” Ex. 1004, 1. McCloskey additionally states that it was published in a 2007 print issue of “Biochem Genet,” with Petitioner adding that the full name of the journal is BIOCHEMICAL GENETICS and that McCloskey was published in a December 2007 volume of the journal. *Id.*; Pet. 29. McCloskey also includes a copyright notice by “Springer Science+Business Media, LLC” with a date of date of 2007. Ex. 1004, 1.

*Parse Biosciences*, Paper 47 at 18; *see also* EX1004.001; *Hulu*, Paper 29 at 17 (precedential) (a reference meets the standard “where the reference bears conventional markers of publication, such as a copyright date; edition identifiers, publication by a commercial publisher, and the assignment of an ISBN number”).

In addition to the Board’s decision in *Parse Biosciences*, numerous decisions from this tribunal have found the types of indicia present here as sufficient to establish publication date. *See Trend Micro*, Paper 29, 9 (a date appearing on a

reference is sufficient “when dealing with documents from recognized sources” with conventional markers.); *see also Meta Platforms v. VL Collective IP LLC*, IPR2023-00923, Paper 16, 27 (P.T.A.B. Dec. 6, 2023) (finding “conventional markers of publication found in [a reference], including the release date and the copyright date” show a reasonable likelihood that a reference was published and available).

This is unsurprising because the Federal Circuit has likewise found that the type of indicia present here are sufficient to establish public availability. *Vidstream, LLC v. Twitter, Inc.*, 981 F.3d 1060, 1065-66 (Fed. Cir. 2020) (finding conventional markers, such as a copyright date, “all uniformly support publication and public accessibility”).

## **2. McCloskey’s Prior Art Status Is Confirmed By Several Other Publications**

While the conventional markers of publication firmly establish McCloskey’s prior art status, the Board further held that McCloskey’s publication year of 2007 is corroborated by several other references. *Parse Biosciences*, Paper 47 at 19.

Starting with McCloskey II, this publication has the same inventors and authors as McCloskey and, according to the Patent Owner, “involve the same subject matter.” *Id.* As the Board explained, McCloskey II “was published on January 25, 2007...[t]hat is just days before McCloskey was received by BIOCHEMICAL GENETICS on January 31, 2007. *See* EX1004, 1 (‘Received: 31 January 2007 /

Accepted: 29 May 2007 / Published online: 23 October 2007’).” *Id.* According to the Board, “it appears that the authors sought to have their research published in a scientific journal promptly after the subject matter of their research had been published by the Office.” *Id.* at 20.

Patent Owner’s **only** argument regarding McCloskey II is that it does not establish the public accessibility of McCloskey because it “is a **different** reference.” Paper 38 at 6. Patent Owner, however, ignores its multiple admissions that McCloskey and McCloskey II are directed to the same subject matter:

- McCloskey, Petitioner’s Ground 1 secondary reference (EX1004), is **a less detailed version** of “US20070020640” to McCloskey et al. (“McCloskey II”) (EX1055), Petitioner’s other secondary reference. Paper 6 at 2.
- Petitioner’s secondary McCloskey reference is **at best cumulative** of the more detailed McCloskey II, which was raised by the Office and substantively discussed as the basis for a potential rejection using its asserted disclosure of a polynucleotide-specific tag—**the same purported teaching for which Petitioner relies on McCloskey** here. *Id.* at 24, 26-28.
- Petitioner’s various cited **McCloskey disclosures substantially overlap with McCloskey II.** *Id.* at 28.

While the corroboration of prior art status by McCloskey is sufficient, the Board also agreed with the Petitioner that the “existence of McCloskey and its publication year of 2007 is confirmed by other sources in the record” including U.S. Patent Nos. 8,835,358 (EX1029) and 9,708,659 (EX1053) (i.e., the “Fodor” patents).

*Parse Biosciences*, Paper 47 at 20 (citing EX1029.003, a United States Patent identifying as a cited reference “McCloskey, et al. Encoding Pcr products with batch-stamps and barcodes. *Biochem Genet.* Dec. 2007;45(11-12):761-7. Epub Oct. 23, 2007”); EX1053.004 (same); EX1060 (article’s bibliography citing McCloskey).

Patent Owner contends the “Fodor Patent (EX1053)...issued in 2017” does not “constitute evidence that McCloskey was publicly accessible as of the 2009 priority date.” Paper 38 at 6. Patent Owner, however, fails to provide a logical explanation for how McCloskey’s reference in EX1053 with the same date and journal of publication is not evidence that it is a 2007 publication. Indeed, when filing an IDS, a patent applicant “has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all *information known* to that individual to be material to patentability.” 37 C.F.R. §§ 1.56(a), 1.98. Patent Owner’s reliance on *ResQNet.com, Inc. v. Lansa Inc.*, fails because the manuals in question were “not marked with any indicum of either publication or secrecy. There was no evidence as to the source publication, or public accessibility of either manual.” 594 F.3d 860, 866 (Fed. Cir. 2010). Unlike here, there are “multiple pieces of evidence” confirming that McCloskey “is what it purports to be (a journal article) and that it was published in 2007.” *Parse Biosciences*, Paper 47 at 19.

### **3. Patent Owner’s Cases Are Irrelevant**

Finally, the Board has held that they “are not persuaded by Patent

Owner's...reliance on [their] cases. The facts before us are different.” *Id.* at 18. For example, the Board noted that in *Neste Oil* the stamps were “handwritten dates,” whereas, in “contrast the dates relied upon by Petitioner are printed, appear to have been included at the time of printing, and appear to have been printed by, or at the direction of, the journal and/or copyright holder, both of which are identified by McCloskey.” *Id.* at 18-19; *see also Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 53, 5-7 (P.T.A.B. Mar. 12, 2015). Likewise, the Board distinguished *Standard Innovation* wherein the “alleged prior art exhibits were ‘printouts of...webpages’ bearing a copyright indication of ‘© 2003-2013,’ which the petitioner argued was proof of subset of the webpages being disseminated publicly in 2003. As the Board stated, this “is a far cry from McCloskey, which is a journal article and which includes specific date information, not only of publishing, but also of the dates the journal received and accepted the article for publication as well as the date of copyright.” *Parse Biosciences*, Paper 47 at 19; *Standard Innovation Corp. v. Lelo, Inc.*, IPR2014-00148, Paper 41, 13-18, 21-22 (P.T.A.B. Apr. 23, 2015).

The rest of the cases relied on by the Patent Owner are also inapposite. *See, e.g., Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773-774 (Fed. Cir. 2018) (finding that a reference was “not publicly accessible” because it was not

published, but rather uploaded to a website that was not a reputable publisher and only provided a list of authors and years, making the search feature “deficient” and the article not functionally accessible); *Medivis, Inc. v. Novarad Corp.*, IPR2023-00042, Paper 35, 28 (P.T.A.B. Mar. 6, 2024) (finding three references not publicly accessible where two were product tutorials lacking any indicia of publication and the third was supported merely by a statement that it was “available online” and a declaration from a self-interested employee of Petitioner’s law firm); *TRW Auto. U.S. LLC v. Magna Elecs. Inc.*, IPR2014-01348, Paper 25, 10 (P.T.A.B. Jan. 15, 2016) (finding that an ISBN number alone is insufficient to demonstrate accessibility where a reference lacked any additional marker of publication). Given the Board’s finding that the “Petitioner has shown that McCloskey is a printed publication as of 2007,” Patent Owner’s motion is moot.

**B. The Hall-Ellis Declaration Is Responsive Supporting Evidence That Should Not Be Excluded**

Patent Owner’s motion seeking exclusion of Dr. Hall-Ellis’s declaration is pointless because the Board has already correctly determined McCloskey to be prior art, even without considering Dr. Hall-Ellis’s testimony. *Parse Biosciences*, Paper 47 at 18. Nevertheless, Petitioner maintains that Dr. Hall-Ellis’s declaration should not be excluded as “belated supplemental evidence” that was “late-submitted,” as Patent Owner contends. Paper 38 at 8-9.

According to Patent Owner, Petitioner did not file Dr. Hall-Ellis's declaration within the time period required under 37 C.F.R. § 42.64(b)(2), which was triggered by Patent Owner's objections filed on February 15, 2024. The triggering event, however, was not February 15, 2024 because the Patent Owner *never* clearly objected to McCloskey's status as a prior art in its initial objections. Paper 12 at 1-3. As discussed above, Patent Owner's initial objections on McCloskey were a generic list of boilerplate objections, none of which made clear challenge to its status as a prior art. *Id.* The objections were based on FRE 901 (authentication), FRE 602 (personal knowledge), FRE 801 (hearsay), and FRE 401/402/403 (relevance), never identifying with sufficient particularity any challenge to McCloskey's prior art status, such as to put the Petitioner on notice. 37 C.F.R. § 42.64(b)(1) (The "objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence."); *see also* Paper 12 at 2. Notably, Patent Owner did make specific objections based on the prior art status of some evidence, but did *not* include McCloskey (EX1004) in that list. *Id.* The first time Patent Owner raised a clear objection that McCloskey was not prior art was in its Response. Paper 21 at 21. This was the first time the Petitioner was put on clear notice of Patent Owner's objection to McCloskey's status as prior art,

and it was thus appropriate for the Petitioner to address it by filing Dr. Hall-Ellis's declaration with its reply.

Indeed, the PTAB Precedential Opinion Panel, other panels of this tribunal, and even the Federal Circuit have consistently held that if a patent owner challenges a reference's status as a printed publication, a petitioner may submit supporting evidence, such as a declaration, with its reply. In *Hulu*, the precedential panel held that "if the patent owner challenges a reference's status as a printed publication, a petitioner may submit a supporting declaration with its reply to further support its argument that a reference qualifies as a printed publication," provided "the evidence must be responsive to the prior briefing." *Hulu*, Paper 29 at 14-15 (precedential).

*Hulu* is applicable here for two reasons. First, because the Patent Owner did not dispute McCloskey's prior art status until its response, submitting a "supporting declaration with [our] reply" to address this newly raised objection in "the prior briefing" (i.e., the Patent Owner's response) was proper. Second, the *Hulu* decision *nowhere* prohibits submission of a supporting declaration in reply even where the declaration is allegedly untimely supplemental evidence. In fact, decisions of this tribunal permit such evidence on reply where it is responsive to a patent owner's response even where supplemental evidence was not submitted. See, for e.g., *Advanced Micro Devices, Inc. v. Aquila Innovations, Inc.*, IPR2019-

01526, Paper 37 at (P.T.A.B. Mar. 10, 2021) (denied to exclude evidence challenged to be untimely under 37 C.F.R. § 42.23(b) because it “provide[d] rebuttal evidence relating to issues raised by Patent Owner in its Response...concerning Exhibit 1005’s status as a printed publication, which is permissible.”).

As in *Hulu*, the Federal Circuit similarly upheld a panel decision denying a patent owner’s motion to exclude and “relying on evidence that was first submitted with [petitioner’s] reply briefs,” determining that a reference was an available printed publication. *Vidstream*, 981 F.3d at 1064-67. The Federal Circuit found that “the Board acted appropriately” when it “permit[ted] [petitioner] to respond to [patent owner’s] challenge by providing additional evidence [in its reply] to establish the [reference’s] publication date.” *Id.* at 1065.

Other panels of this tribunal have similarly held that when a patent owner challenges a reference’s status, a petitioner may properly submit supporting evidence with its reply. *See Cooler Masters Co., Ltd. v. Aavid Thermalloy LLC*, IPR2019-00146, Paper 55, 22-23 (P.T.A.B. June 4, 2020) (The Board does “not agree with Patent Owner that Petitioner’s new evidence, submitted in the Reply, was improper as untimely” to support a showing that a reference is a printed publication because “it was filed in response to arguments raised in Patent Owner’s Response” and “did not amount to, or result in, a change in Petitioner’s theory in the case.”);

*Grunenthal GMBH v. Antecip Bioventures II LLC*, PGR2019-00026, Paper 24, 19 (P.T.A.B. July 28, 2020) (“Patent Owner argues that Petitioner was required to submit any evidence of the printed-publication status of its asserted references with the Petition rather than with the Reply. That argument is unpersuasive in view of the decision in *Hulu, LLC v. Sound View Innovations, LLC*.”).<sup>2</sup>

While Petitioner’s cases are right on point, Patent Owner’s cases are all inapposite. *See, e.g., Dropbox, Inc. v. Synchronoss Techs., Inc.*, IPR2016-00850, Paper 41, 19-20 (P.T.A.B. Oct. 5, 2016) (pre-*Hulu* decision excluding a declaration used to support a substantively different reference than the challenged reference); *FedEx Corp. Servs., Inc. v. Roambee Corp.*, IPR2022-00934, Paper 41, 7-10 (P.T.A.B. Nov. 3, 2023) (excluding new evidence submitted by Patent Owner in a **sur-reply** in the form of a journal article and declaration used to support a **new**

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<sup>2</sup> Patent Owner argues in a footnote, without explanation, that EX1085 authenticates a “different version” of McCloskey, allegedly because of the inclusion of a copyright notice. Paper 38 at 8 n.4. This is totally wrong. As Dr. Hall-Ellis explains, the copyright notification was “affixed on the document when the Library prepared the scan” so that the library could comply with copyright laws. *See* EX1090 ¶ 3. EX1085 to Dr. Hall-Ellis’s declaration is the **exact** same document as EX1004.

argument and claim construction); *Toshiba Corp. v. Optical Devices, LLC*, IPR2014-01447, Paper 34, 44-47 (P.T.A.B. Mar. 9, 2016) (pre-*Hulu* decision excluding new evidence in the form of a webpage used to support a *new* argument); *Sirius XM Radio Inc. v. Fraunhofer-Gesellschaft Zur Forderung Der Angewandten Forschung E.V.*, IPR2018-00690, Paper 63, 13-15 (P.T.A.B. July 23, 2020) (excluding new evidence supporting a *new* argument where “the Petition did not show the provisional application provides written description support for the claims of the issued patent” as required under *Dynamic Drinkware*). Patent Owner’s reliance on soundbite advocacy from inapposite cases does not remotely support exclusion.

Even ignoring the numerous on-point decisions, including the Precedential Opinion Panel’s decision in *Hulu*, Patent Owner’s argument based on 37 C.F.R. § 42.64(b)(2) should be rejected. The Board has broad discretion and “may waive or suspend a requirement of parts 1, 41, and 42.” 37 C.F.R. § 42.5(b). In situations such as this, where Patent Owner waited until after institution in its Response to challenge McCloskey’s publication date, and Petitioner did not change any theory with its supplemental evidence, even if the timeline of 37 C.F.R. § 42.64 applied (it does not), the Board should apply its discretion and waive the deadline because there can be no possible prejudice.

#### **IV. CONCLUSION**

EX1004 and EX1085 should not be excluded.

Dated: October 18, 2024

Respectfully submitted,

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**CERTIFICATE OF PAGE COUNT**

The undersigned certifies that the foregoing PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE complies with the 15-page limitation in 37 C.F.R. § 42.24(a)(1)(v).

Dated: June 28, 2024

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **PETITIONER'S  
OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE** is being  
served on October 18, 2024, via electronic mail pursuant to 37 C.F.R. § 42.6(e) to  
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