UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SMAXTEC INC. and
SMAXTEC ANIMAL CARE GMBH,
Petitioner

v.

ST REPRODUCTIVE TECHNOLOGIES, LLC
Patent Owner.

Case: IPR2024-00885
Patent No. 8,823,515

PRELIMINARY REPLY IN SUPPORT OF PETITION FOR *INTER PARTES* REVIEW

I. Trevarthen Was Publicly Accessible Before the Critical Date

The Petition provides layers of contemporaneous evidence demonstrating Trevarthen's public accessibility before the critical date. Petition, 7-9. This includes the (i) March 2008 ISR (Exs. 1028, 1; 1029; 1003, ¶70); (ii) 2007 Research Online webpage explaining theses "are easily retrievable," "most hits … come via Google search" (Ex. 1031, ¶¶19-20), and "Research Online . . . provides enhanced access to internet search engines" (Ex. 1030, p. 7); (iii) Trevarthen archive registering >500 downloads in 2008 (Ex. 1031, ¶¶21-33); and (iv) Dr. Brown-Brandl's reasonably diligent searching testimony (Ex. 1003, ¶¶68-70). This evidence greatly exceeds the reasonable likelihood standard. *Hulu v. Sound View Innovations*, IPR2018-01039, Paper 29 at 12 (PTAB Dec. 20, 2019) (precedential).

Decisions rejecting public accessibility cited by the POPR bear no resemblance to the record here. *E.g.*, *Acceleration Bay v. Activision Blizzard*, 908 F.3d 765, 774 (Fed. Cir. 2018) (article "indexed only by author and year …was not meaningfully indexed"); *Blue Calypso v. Groupon*, 815 F.3d 1331, 1349–50 (Fed. Cir. 2016) ("Petitioner [] provided ***no evidence*** that Ratsimor was disseminated … other than testimony … that it was 'publicly available around November 2003.'"); *First Solar v. Rovshan Sade*, IPR2023-00827, Paper 13 at 18-19 (PTAB Nov. 16, 2023) (the "case ***lacks any testimonial evidence*** that a [POSA] would be .. aware of [a company's] web address.") (emphases added).

The handful of date-limited Google searches conducted by Patent Owner's expert, Dr. Bowser (POPR, 18-19 (citing Ex. 2001, ¶¶ 63-78)), rely on a method

previously rejected by the Board. *See Seabed Geosolutions v. Fairfield Indust.*, IPR2018-00961, Paper 11 at 16 (PTAB Nov. 8, 2018) (Google Scholar search "conducted recently" did not demonstrate public accessibility). Dr. Bowser assumes that a date-limited Google search in 2024 shows the results that would have been obtained in 2008. But he fails to explain the basis of this assumption. No evidence is presented as to how Google determines a publication date for a web page, or whether the assigned date might change if the page undergoes subsequent editing. Courts have recognized that Google search results change constantly. *See Novation Ventures v. J.G. Wentworth Co., LLC*, 2015 WL 12765467, at *3 (C.D. Cal. Sept. 21, 2015) ("results of a Google search are continually changing"); *Vampire Fam. Brands v. MPL Brands*, 2021 WL 4134841, at *2 (C.D. Cal. Aug. 6, 2021) (noting the "dynamic and constantly changing nature of the Google search system"). Patent Owner submits neither evidence nor testimony that would permit the Board to gauge the effectiveness of the date-limited Google search method.

Dr. Bowser's search methodology also fails to reflect reasonable diligence. Dr. Brown-Brandl explained that a POSA would have used ***multiple*** search engines and queries. Ex. 1003, ¶¶68-69. Dr. Bowser conducted only a few queries using one search engine. Ex. 2001, ¶¶63-78. Finally, Dr. Bowser's theories that the ISR examiner received "a URL address from an Australian University" and that the >500 hits for Trevarthen were "initiated by the author, his friends and family, his faculty advisors" are fanciful speculation at odds with the record and Board

decisions. *Id.*, ¶¶82, 88; *see Incyte Corp. v. Concert Pharms.*, IPR2017-01256, Paper 14 at 16-17 (PTAB Apr. 9, 2018) ("cite[] in an International Search Report" was evidence of pre-critical date public accessibility). Based on these deficiencies, the Board should afford the POPR's public accessibility testimony no weight.

II. The "Implanted" Claim Elements Are Taught by Laitinen

As explained in the Petition, Laitinen (Ex. 1006) describes a "pico" device 100 that uses RFID, functions as an "identification tool," senses "body temperature," and can "also be an implant inside an animal." Petition, 36-37, 41-43 (Ex. 1006, 3:28-35, 3:51-57). Exemplary pico devices 100a and 100b are shown as being read by an external RFID reader 210. Petition, 41; Ex. 1006, FIG. 2. Thus, Laitinen clearly teaches elements 1[B] and 1[C] notwithstanding that the pico device can alternatively ("e.g.") be "attached" to an "animal's ear." *Id.*, 3:29-31.

The POPR asserts that the pico RFID device is only "attached" to the animal's ear. POPR, 54. While incorrect, this would still meet the "implanted in" claim elements given the '515 patent's definition. Ex. 1001, 7:66-8:3 ("[The device] … can be ***attached***, incorporated, implanted, imprinted, or ***held*** (individually and collectively referred to herein as '***implanted***.'"). Thus, the POSA would understand from the specification that being "attached" to the ear is being "implanted;" further, the device is "in" the ear in the same sense that an earring is also placed "in" the ear.

Dated: September 26, 2024 By: */Blaine M. Hackman/*
Blaine Hackman, Reg. No. 67,479

CERTIFICATE OF SERVICE

I certify that today in:

smaXtec Inc. and smaXtec Animal Care GMBH v. ST Reproductive Technologies, LLC, IPR2024-00885 (U.S. Patent 8,823,515)

I caused to be served a copy of:

PRELIMINARY REPLY IN SUPPORT OF PETITION FOR INTER PARTES REVIEW

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