Filed on behalf of ST Reproductive Technologies, LLC.
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SMAXTEC INC. and
SMAXTEC ANIMAL CARE GMBH,
Petitioners

v.

ST REPRODUCTIVE TECHNOLOGIES, LLC,
Patent Owner

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

ST REPRODUCTIVE TECHNOLOGIES, LLC'S PRELIMINARY SUR-REPLY

I. THE PETITION FAILS TO SHOW TREVARTHEN IS PRIOR ART

Petitioners contend they have provided "layers" of evidence demonstrating Trevarthen's public accessibility, but this evidence goes to technical accessibility at best and fails to show that the thesis was indexed. Petitioners' purported support for indexing is an article alleging that unspecified papers uploaded to Research Online are "usually available on Google." Pet., 8. Rather than rely on this non-specific hearsay, Patent Owner's expert did what Petitioners should have done and used Google's "custom date range"—applying Petitioners' own keywords—to search for items indexed before the critical date. Dr. Bowser's inability to locate Trevarthen using this technique establishes a lack of public accessibility and demonstrates Petitioners' failure to meet their burden.

Recognizing the strength of the argument, Petitioners counter that Dr. Bowser's use of Google's date range tool was "previously rejected by the Board," but that is not true. The Board has previously found Dr. Bowser's method of assessing public accessibility reliable, including in a decision affirmed by the Federal Circuit. *See BLD Servs. v. LMK Techs.*, No. IPR2014-00770, 2015 WL 7304016, at *7 (P.T.A.B. Nov. 18, 2015) (relying on "Google Search Tools to enter a Custom date range" for accessibility), *affirmed per curiam*, 676 F. App'x 1009 (Fed. Cir. 2017). Petitioners' *Seabed* case, in contrast, is inapposite because it addresses a Google Scholar search with *no* date limit. *See Seabed Geosolutions v.*

Fairfield Indust., IPR2018-00961, Paper 11 at 16 (PTAB Nov. 8, 2018).

Petitioners further argue that Dr. Bowser's search should be ignored because "Google search results change constantly," but this undermines Petitioners' own public accessibility argument. If Google results are not sufficiently reliable to show a *lack* of public accessibility, then Petitioners' hearsay evidence about what was "available on Google" also cannot show that Trevarthen *was* publicly accessible.

II. EXTERNAL DEVICES ARE NOT "IMPLANTED IN AN ANIMAL"

Petitioners initially interpreted "implanted in an animal" to require implantation *inside* of an animal, which is the same meaning Patent Owner applies. *See, e.g.*, Pet., 13 (identifying ingested boluses and subdermal microchips as "implanted" and stating a "POSA would have understood that a bolus, by definition, is implanted in a cow"), 42 (identifying an "implant inside the animal" as "implanted"). It is not surprising that the parties initially agreed, because their interpretation is consistent with an ordinary reading of the claims. *See Gemstar-TV Guide Int'l, Inc. v. Int'l Trade Comm'n*, 383 F.3d 1352, 1372 (Fed. Cir. 2004) (noting that "in" denotes a location within a materially bounded object). Now that Patent Owner has shown that Petitioners' Laitinen grounds rely on an *external* device, however, Petitioners seek a new, broader construction. But neither the claim language nor the specification support Petitioners' new position.

Petitioners rely on a purported definition of "implanted" to support their

interpretation of the "implanted in an animal" limitations, but this effort to read "*in an animal*" out of the claims is improper. *See Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix, Inc.*, 672 F.3d 1270, 1275 (Fed. Cir. 2012) (noting "the importance of construing claim terms in light of the surrounding claim language, such that words in a claim are not rendered superfluous"). It is also inconsistent with the alleged definition in the specification, which in a portion omitted by Petitioners, distinguishes between implanted "on" (as Petitioners advocate for) and implanted "within" (i.e., "in," as recited in the claims). EX1001, 8:1-4 (stating an RFID device "can be attached, incorporated, implanted, imprinted, or held (individually and collectively referred to herein as 'implanted') ***on or within*** an RFID object") (emphasizing Petitioners' omission).

Using an alleged definition of "implanted" as a bootstrap to broaden the meaning of "implanted in an animal," as Petitioners invite the Board to do in their reply, is improper. When construing claims, the ordinary meaning of the words controls unless the patentee "clearly express[es] an intent to define the term," *See, e.g.*, *GE Lighting Solutions, LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014). No clear intention exists in the specification. In fact, *where* a device is implanted (e.g., "on or within") is outside the alleged definitional language. Under the correct claim construction, therefore, Laitinen fails to disclose a device arranged as claimed. *See* POPR, 9-10, 54-57.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing ST Reproductive Technologies, LLC's Preliminary Sur-Reply was served on counsel of record on October 3, 2024 by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS), as well as delivering a copy via electronic mail to counsel of record for the Petitioners at the following addresses:

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