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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AXION BIOSYSTEMS, INC.,

Petitioner,

v.

AGILENT TECHNOLOGIES, INC.,

Patent Owner.

Case No. IPR2024-01467

Patent 11,906,508

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

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PATENT OWNER'S EXHIBIT LIST

Pursuant to 37 C.F.R. § 42.63(e), Patent Owner Agilent Technologies, Inc. hereby submits its exhibit list associated with the above-captioned *inter partes* review of U.S. Patent No. 11,906,508.

Ex. 2001	Statutory Disclaimer in a Patent Under 37 C.F.R. 1.321(a)
Ex. 2002	File History of U.S. Patent No. 11,906,508
Ex. 2003-1	File History of U.S. Patent No. 9,709,548 (pp. 1-263)
Ex. 2003-2	File History of U.S. Patent No. 9,709,548 (pp. 264-551)
Ex. 2003-3	File History of U.S. Patent No. 9,709,548 (pp. 552-862)
Ex. 2003-4	File History of U.S. Patent No. 9,709,548 (pp. 863-1115)
Ex. 2003-5	File History of U.S. Patent No. 9,709,548 (pp. 1116-1316)
Ex. 2004	Declaration of Brian T. Cunningham, Ph.D. (withdrawn on 7/22/25, <i>see</i> Ex. 3001)
Ex. 2005	<i>Curriculum Vitae</i> of Brian T. Cunningham, Ph.D.
Ex. 2006	Graf, Modern Dictionary of Electronics (1999) (excerpts)
Ex. 2007	File History of U.S. Patent No. 7,459,918 (Jones)
Ex. 2008	File History of U.S. Patent No. 7,192,752 to Xu et al. ("Xu-752")
Ex. 2009	Declaration of Benjamin Sanchez Terrones, Ph.D.
Ex. 2010	<i>Curriculum Vitae</i> of Benjamin Sanchez Terrones, Ph.D.
Ex. 2011	MDS Sciex - CellKey Brochure (c. 2005)
Ex. 2012	CellKey Specifications (2007)
Ex. 2013	CellKey Press Release (2005)
Ex. 2014	U.S. Patent App. Pub. No. 2008/0043448A1 (Finnerty)
Ex. 2015	U.S. Patent App. Pub. No. 2008/0068790A1 (Lee)
Ex. 2016	U.S. Patent App. Pub. No. 2008/0037218A1 (Sharma)
Ex. 2017	U.S. Patent App. Pub. No. 2008/0298014A1 (Franco)
Ex. 2018	U.S. Patent App. Pub. No. 2008/0257594A1 (Engblom)
Ex. 2019	U.S. Patent App. Pub. No. 2008/0304223A1 (Franz)
Ex. 2020	2nd Statutory Disclaimer in a Patent Under 37 C.F.R. 1.321(a)

Ex. 2021	Declaration of Yang Wang, Ph.D., Esq.
Ex. 2022	Updated Declaration of Yang Wang, Ph.D., Esq.
Ex. 2023	D. Ct. Docket – Claim Construction Rulings (highlighted)
Ex. 2024	Handbook & Selection Guide for Computer-Based Data Acquisition & Control Systems (Neff) (2007)
Ex. 2025	Current Biosensor Technologies in Drug Discovery (Cooper) (2006)
Ex. 2026	Label-Free Biosensors - Electrical impedance technology applied to cell-based assays (McGuinness & Verdonk) (2009)
Ex. 2027	Cellular Dielectric Spectroscopy - A Label-Free Comprehensive Platform for Functional Evaluation of Endogenous Receptors (Verdonk) (2006)
Ex. 2028	Enhanced Selectivity Screening of GPCR Ligands Using a Label-Free Cell (McGuinness) (2009)
Ex. 2029	U.S. Pat. App. Pub. No. 2007/0087326A1 (Minor)
Ex. 2030	Cellular Dielectric Spectroscopy, A Powerful New Approach to Label-Free Cellular Analysis (2004) (Ciambrone)
Ex. 2031	Cellular Dielectric Spectroscopy - A Label-Free Technology for Drug Discovery (Leung) (2005)
Ex. 2032	U.S. Pat. App. Pub. No. 2009/0093011A1 (Fang)
Ex. 2033	U.S. Pat. No. 9,121,806 (Bhansali)
Ex. 2034	U.S. Pat. App. Pub. No. 2011/0195436A1 (Moreau)
Ex. 2035	Evaluating Cellular Impedance Assays for Detection of GPCR Pleiotropic Signaling and Functional Selectivity (Peters) (2009)
Ex. 2036	Monitoring fibroblast behavior in tissue culture with an applied electric field (Giaever) (1984)
Ex. 2037	Microplate Dimensions Guide (2007)

Patent Owner Agilent Technologies, Inc. (“Agilent”) opposes the Motion to Strike filed by Petitioner Axion Biosystems, Inc. (“Axion”). The Board has the authority and discretion to waive or suspend Rule 42.23(b) in the interests of justice, particularly where, as here, the objected-to exhibits: (a) respond directly to new arguments raised for the first time by Axion in its Reply; (b) provide basic and contemporaneous technical background information to assist the Board’s understanding of the technology at issue; and (c) cause no prejudice to Axion.

I. THE BOARD HAS DISCRETION TO CONSIDER EXHIBITS 2024-2037 IN THE INTERESTS OF JUSTICE

A. The Board Has Both Regulatory And Inherent Authority To Waive Or Suspend Procedural Rules

While Rule 42.23(b) generally prohibits new evidence with a sur-reply, this rule is not absolute. As Rule 42.5(b) explicitly states, “[t]he Board may waive or suspend a requirement of parts 1, 41, and 42 and may place conditions on the waiver or suspension.” Furthermore, Rule 42.5(c)(3) provides that “[a] late action will be excused on a showing of good cause or upon a Board decision that consideration on the merits would be in the interests of justice.” *See generally* Memorandum from Acting Director Stewart (July 31, 2025), at 1 n.1 (“[T]he USPTO has discretion to waive, suspend, relax, or modify its procedural rules.”).

Federal courts have upheld the PTAB’s discretion to regulate procedural rules and the introduction of evidence during IPR proceedings. *See, e.g., Belden*

Inc. v. Berk-Tek LLC, 805 F.3d 1064, 1081 (Fed. Cir. 2015) (recognizing that patent owners could request the Board to waive or suspend regulations that impair their ability to respond to new evidence introduced by petitioners); *VidStream LLC v. Twitter, Inc.*, 981 F.3d 1060, 1065 (Fed. Cir. 2020) (holding that the PTAB acted within its discretion by allowing a sur-reply to address new evidence introduced in reply briefs, ensuring procedural fairness and avoiding prejudice); *ZyXEL Commc'ns Corp. v. UNM Rainforest Innovations*, 107 F.4th 1368, 1383 (Fed. Cir. 2024) (affirming that parties may submit new evidence and expert declarations with sur-replies if requested by the parties to avoid prejudice). Accordingly, unlike the cases cited by Axion, in these circumstances, the Board may properly exercise its discretion to consider Agilent's Exhibits 2024-2037 where good cause exists and doing so would be in the interests of justice.

B. Agilent's Exhibits Directly Rebut Axion's New Reply Arguments

Exhibits 2024-2037 directly rebut the new arguments that Axion raised for the first time in its Reply. The Board has permitted new evidence in sur-replies under "extraordinary circumstances". *See, e.g., Omega Liner v. Buergofol*, IPR2023-01372, Paper 44, at 2-3 (PTAB Nov. 18, 2024); *Zodiac Pool Sys. v. Aqua Prods.*, IPR2013-00159, Paper 51, at 2 (PTAB Mar.28, 2014) (authorizing submission of additional information in the interest of justice for full rebuttal). Due process also requires that Agilent be afforded a meaningful opportunity to

respond to Axion’s new Reply arguments. *See Hunting Titan v. Dynaenergetics Europe*, IPR2018-00600, Paper 67, at 15 (PTAB Jul. 6, 2020).

1. Axion Introduces Ghosh As A New Ground Of Unpatentability

In its Reply, Axion argues for the first time that “the ’508 patent’s alleged invention is, at most, a minor variation on Ghosh, and would have been obvious for all of the reasons stated in the Petition.” Reply at 12. But Axion did not identify Ghosh as a ground of unpatentability in its Petition. *See* Pet. at 1-2.

Axion acknowledges that Exhibits 2036 and 2037 “do relate to Ghosh”. Mot. at 4. These exhibits directly rebut Axion’s new “minor variation of Ghosh” argument by providing the Board with (a) the experimental setup that Ghosh itself explicitly references (*i.e.*, a single sample of cells growing on a “[p]olystyrene dish (60 mm) of tissue culture optical quality...”) (Ex. 2036 at 3761); and (b) a contemporaneous product catalog showing the dimensions for a typical microtiter plate well would have been about 7 mm in diameter (Ex. 2037 at 4). These exhibits should be considered by the Board in understanding Ghosh’s disclosure.

2. Axion Eliminates Jones’ Multiplexing Architecture And The Time Required For Signal Switching And Settling

In its Reply, Axion omits for the first time any mention of the 409 milliseconds of switching and settling time in Jones’ ZMS, arguing “Jones’s ¶ [0030] is a result of each of eight daughter boards ‘measuring 16 wells/channels

(12 wells plus 4 reference network channels) at 68.2 milliseconds per object (68.2 milliseconds * 16 = 1091.2 milliseconds)’).” Reply at 19. Axion also eliminates for the first time any mention that Jones’ system requires considerable additional time “for *multiplexer switching and signal settling*.” Ex. 1006 ¶ [0030]. Axion’s new and deliberate omissions in its Reply are an unfair attempt to alter Jones’ express teachings regarding its system architecture.

Exhibit 2024 responds to Axion’s new Reply argument by providing a representative data acquisition reference manual explaining why, in a multiplexed system, signal “settlement times” are necessary to achieve acceptable measurement accuracy. Ex. 2024 at 175. That Exhibit also explains why, in systems like the one described in the ’508 Patent, “[w]ith an ADC per channel, the sampling rate is not encumbered with considerations such as multiplexing and post-amplifier settling time.” *Id.* at 164. By eliminating Jones’ switching and settling time, Axion endeavors to eliminate the significant additional times required in Jones’ multiplexed system, which Jones expressly teaches are designed for “allowing internal correction of impedance measurement drift, maximized measurement accuracy, and minimized system size.” Ex. 1006 Abstract & ¶ [0006].

3. Axion Argues That Sciex’s Well-Known Multiplexed CellKey System With A 2-Second Update Rate Is Irrelevant To Sciex’s “Target 1.5 Second Update Period” In Jones

In its Reply, Axion argues for the first time that “Agilent’s Exs. 2011-2013,

indicating *2-10 second update periods for a 96-well plate in MDS Sciex's*

commercial product, are beside the point.” Reply at 7, n.3. Axion made no objection to these exhibits previously, including under Fed. R. Evid. 401.

Exhibits 2025-2035 respond to Axion's new argument in its Reply by providing general technical background showing how contemporaneous POSAs understood and applied MDS Sciex's commercial CellKey product, which was very similar to MDS Sciex's ZMS described in Jones (except for the CellKey's larger form factor). In particular, Jones' ZMS system had a “target 1.5 second update period.” Ex. 1006 ¶ [0030]. The multiple examples of contemporaneous uses of the similar CellKey system reveal that POSA's understood and applied the CellKey's 2 second update rate specified by Sciex. Exs. 2025-2035. Those examples, from both scientific literature and patent disclosures, demonstrate that when presented with target throughput specifications from Jones' assignee, Sciex, POSAs every-where understood and applied that equipment consistent with the “*2 s update rate*” operating parameters. *Id.* (emphasis added). Skilled artisans did *not* endeavor to reduce the update time by, *e.g.*, changing the system's specifications and/or concocting new scanning frequencies as Axion alleges would reduce the measurement time. This contemporaneous evidence not only rebuts Axion's new argument that the CellKey exhibits are “beside the point”, but also supports the testimony of Dr. Sanchez that “[a] POSA would understand that Jones

teaches that its impedance measurement system has a ‘target 1.5 second update period’, which is consistent with the update rate of impedance measurement systems in that era (namely, a few seconds).” Ex. 2009 ¶ 52.

C. The Exhibits Provide Basic And Non-Controversial Background Technical Information To Assist The Board

The Board has discretion to consider evidence that is helpful to explain the technology at issue and how a POSA would have understood that technology. *See generally Apple Inc. v. LBT IP I LLC*, IPR2020-01191, Paper 39 at 9-10 (PTAB Mar. 2, 2022). As discussed above, the challenged rebuttal exhibits serve precisely that purpose. Agilent’s background technical information is not technically controversial, and Axion has waived all formal objections to this evidence. *See infra* Part II.B.E. Thus, there can be no legitimate dispute that this evidence would be helpful for the Board to fully understand the contemporaneous technological context of the ’508 Patent as viewed from the perspective of a POSA at that time.

D. Axion Will Suffer No Prejudice From Including The Exhibits

Axion's Motion fails to even assert, let alone identify, any potential prejudice that Axion would purportedly suffer if the Board were to consider Exhibits 2024-2037. Axion does not and cannot legitimately challenge their substantive accuracy or relevance. Axion’s purely *procedural* concern is outweighed by the interests of justice in ensuring a complete record, especially where Axion’s own new reply arguments created the need for this additional

evidence. *See Cisco Sys., Inc. v. K. Mizra LLC*, 2024 WL 3841809 at *4 (Fed. Cir. 2024) (considering sur-reply that was a “direct response” to reply brief and introduced no new evidence).

E. Axion Has Waived Its Objections Under Rule 42.23(b)

Axion filed Objections to Evidence on October 21, 2025 (Paper 22), and a Second Objection to Evidence on November 13, 2025 (Paper 27). In both formal Objections, Axion objected to Exhibits 2024-2037 on the following three grounds: (i) 37 C.F.R. § 42.23(b); (ii) Fed. R. Evid. 403; and (iii) Fed. R. Evid. 901.

On November 14, 2025, Axion proposed that “*Petitioner will agree to not file a motion to exclude Exhibits 2024-2037 or the Supplemental Evidence Exhibits (thus mooted the objections of Papers 22 and 27), if Patent Owner agrees to not seek expungement of the Second Objections.*” Agilent stipulated to Axion’s proposal. As a result, Axion’s objections in those papers, including the objections, under Rule 42.23(b) should be deemed waived. *See* 37 C.F.R. § 42.64(c) (“A motion to exclude evidence must be filed to preserve any objection.”); *see also Apple, Inc. v. Valencell, Inc.*, IPR2017-00321, 2018 WL 2734878, at *1 (PTAB June 5, 2018) (“Patent Owner filed objections” but did not file “a Motion to Exclude. Consequently, these objections are deemed waived.”).

For the foregoing reasons, Agilent respectfully requests that the Board exercise its discretion to deny Axion's Motion to Strike in the interests of justice.

Respectfully submitted,

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Dated: November 25, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the **PATENT OWNER'S OPPOSITION TO MOTION TO STRIKE** is being served on November 25, 2025, electronically via the Patent Trial and Appeal Case Tracking System ("P-TACTS") and via electronic mail to the email addresses below:

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