

Filed on behalf of Senior Party ToolGen, Inc.

Paper No. ____

Anthony M. Insogna
Timothy J. Heverin
S. Christian Platt
JONES DAY
250 Vesey Street
New York, NY 10281
Tel: (212) 326-3939
Fax: (212) 755-7306
aminsogna@jonesday.com
tjheverin@jonesday.com
cplatt@jonesday.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**THE BROAD INSTITUTE, INC., MASSACHUSETTS INSTITUTE OF
TECHNOLOGY, AND PRESIDENT AND FELLOWS OF
HARVARD COLLEGE,**

Junior Party,

Patents 8,697,359; 8,771,945; 8,795,965; 8,865,406; 8,871,445; 8,889,356;
8,889,418; 8,895,308; 8,906,616; 8,932,814; 8,945,839; 8,993,233; 8,999,641; and
9,840,713; and Applications 14/704,551 and 15/330,876,

v.

TOOLGEN, INC.

Senior Party.

Application 14/685,510

Patent Interference No. 106,126 (DK)

**TOOLGEN MISCELLANEOUS MOTION 1
(to exclude inadmissible evidence)**

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1 Senior Party (“ToolGen”) moves that the Board exclude certain evidence Junior Party
2 (“Broad”) has introduced and cited in support of its Motions, Oppositions, and Replies as
3 inadmissible under the Federal Rules of Evidence. Such evidence, discussed in detail below,
4 consists of generic images devoid of any identification or context, hearsay emails, and materials
5 created or published after the filing date in question. In addition, the portions of the declaration of
6 Broad’s expert, Dr. Christoph Seeger, which rely on these inadmissible exhibits, should be
7 excluded because he bases his opinions on exhibits no reasonable expert would have considered.
8 ToolGen raised proper and timely objections to the evidence against which it moves. *See* Ex. 1113
9 (ToolGen’s Objections to Junior Party Evidence); 37 C.F.R. § 41.155(b)(1); F1. Accordingly,
10 Broad’s inadmissible evidence should be excluded.

11 **I. ARGUMENT**

12 **A. The Exhibits Broad Offers As Alleged “Best Proofs” Are Inadmissible**

13 In its Motion 1, Broad argues to substitute Count 1 with Proposed Count 2, and in doing
14 so, relies on a number of exhibits that are not admissible under the Federal Rules of Evidence
15 (“FRE”) because they are unauthenticated, contain inadmissible hearsay, or are irrelevant.

16 **1. Numerous Broad Exhibits Should Be Excluded As Broad Failed to**
17 **Authenticate Them**

18 Broad relies on numerous unauthenticated exhibits that are inadmissible for failure to meet
19 the requirements of FRE 901. *See* Broad Motion 1, Paper 72 (“Mot. 1”), 7:11–10:6 (citing Exs.
20 2526, 2530, 2533, 2535, 2536, 2563, 2565, 2566, 2581, 2582, 2922); F2. Before evidence may be
21 admitted, FRE 901 requires that it be authenticated by evidence “sufficient to support a finding
22 that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Evidence may be
23 authenticated by its “appearance, contents, substance, internal patterns, or other distinctive
24 characteristics . . . taken together with all the circumstances.” Fed. R. Evid. 901(b)(4). Broad has

1 not offered any evidence that the above-listed exhibits, which Broad contends are their “best
2 proofs” (lab notes, images, and notebook entries) are what Broad claims them to be. F3. Each
3 exhibit lacks sufficient identifying features, labels, captions, or descriptions to provide
4 circumstantial authentication under FRE 901(b)(4).

5 For example, while Broad argues that Exhibit 2526 shows a genetic map and sequence of
6 a CRISPR system in a bacterium, it includes a “Dec. 2, 2020” printed date—*eight years after the*
7 *relevant time period*—demonstrating the need for authentication. F4. Additionally, Exhibit 2530
8 is an image of an electrophoresis gel that Broad alleges shows a dual-molecule RNA configuration
9 that was “used to target, cleave, and edit an endogenous ‘NTF3’ genomic target in eukaryotic cells
10 in October–November 2011.” Mot. 1, 8:9–13. Yet Exhibit 2530 contains only a single annotated
11 red arrow in the middle of the exhibit. There are no dates, labels, or other identifying marks (*e.g.*,
12 molecular ladder or identity of samples in each experimental lane) that typically would be present
13 in such an image of a gel electrophoresis meant to prove the contents of the underlying experiment.
14 F5. Similarly, Exhibits 2535, 2536, and 2563, alleged by Broad to show successful single and
15 dual-molecule systems, Mot. 1, 9:6–10:6, are unannotated images completely devoid of identifying
16 features. F6. These could be generic images from anywhere; none contain labels, captions, or
17 descriptions that would allow a person of ordinary skill in the art (“POSA”) to understand the
18 alleged experiment, let alone assess whether the exhibit is what Broad claims it to be. Nor does
19 Broad offer any sponsoring witness who has personal knowledge of the exhibits to verify their
20 authenticity. Dr. Seeger does not profess to have any knowledge of the aforementioned exhibits.
21 F7. Exhibits 2526, 2530, 2533, 2535, 2536, 2563, 2565, 2566, 2581, 2582, and 2922 should be
22 excluded under FRE 901.

1 **2. Broad’s Hearsay Exhibits Should Be Excluded**

2 Broad cites various emails between Broad inventors, colleagues, and third parties, each of
3 which are inadmissible hearsay. *See* Mot. 1, Paper 72, 7:11–9:13 (citing Exs. 2708, 2710, 2716,
4 2734, 2751, 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784, 2829, 2830, 2842,
5 2845); *see also* Broad Motion 3, Paper 73 (“Mot. 3”), 17:9–13, 18:7–15 (citing Exs. 2704, 2705,
6 2793); F8. Hearsay is an out-of-court statement offered for the truth of the matter asserted and is
7 generally inadmissible. Fed. R. Evid. 801(c); Fed. R. Evid. 802. Each of the above-identified
8 emails consists of out-of-court statements, which Broad offers to prove that Broad’s experiments
9 allegedly showed successful reduction to practice of Broad’s Proposed Count 2. F9. Broad has
10 not demonstrated that any exception to the hearsay rules apply. F10. As such, each are hearsay
11 under FRE 801 and 802. Exhibits 2704, 2705, 2708, 2710, 2716, 2734, 2751, 2770, 2771, 2772,
12 2773, 2775, 2777, 2780, 2781, 2782, 2784, 2793, 2829, 2830, 2842, and 2845 should be excluded.

13 **3. Post-Filing Exhibits Should Be Excluded As Irrelevant Because They**
14 **Do Not Provide Information About The State Of The Art At The**
15 **Relevant Time**

16 Exhibits that post-date the relevant time period should also be excluded as irrelevant.
17 Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be
18 without the evidence,” and “the fact is of consequence in determining the action.” Fed. R. Evid.
19 401. However, even relevant evidence “[may be excluded] if its probative value is substantially
20 outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,
21 misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”
22 Fed. R. Evid. 403.

23 An obviousness analysis, which is used to determine (1) whether a substitute count is
24 appropriate (*i.e.*, whether it contains a single invention) and (2) whether claims properly

1 correspond to the count, requires viewing the facts through the lens of a POSA at the time of the
2 relevant patent application filing. Exhibits, however, that post-date the application date are not
3 relevant to the state of the art at the time of the application. *See Eisai Co. Ltd. v. Dr. Reddy's*
4 *Labs., Ltd.*, 533 F.3d 1353, 1359 (Fed. Cir. 2008) (“[T]he obviousness inquiry must rely on
5 evidence available ‘at the time’ of the invention.”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398,
6 420–21 (2007); *cf. In re Wright*, 999 F.2d 1557, 1562–63 n.8 (Fed. Cir. 1993) (“[T]he issue is not
7 what the state of the art is today or what a skilled artisan today would believe, but rather what the
8 state of the art was [at the time of filing] and what a skilled artisan would have believed at that
9 time.”). Post-filing exhibits say nothing about the state of the art or the knowledge of a POSA at
10 the relevant time—December 12, 2012, the application filing date—and are irrelevant to the
11 analysis or action here. Moreover, the admission of post-filing exhibits will only confuse the issues
12 under FRE 403.

13 Broad and Dr. Seeger rely on Exhibit 2217, which was published *after* December 12, 2012,
14 as allegedly pertaining to the definition of guide RNA: Ex. 2454, ¶¶166–168 (Ex. 2217 (published
15 2014)). F11. Similarly, Broad and Dr. Seeger rely on post-December 12, 2012 Exhibits 2201,
16 2226, 2231, 2232, 2654 and 2683 for the proposition that SaCas9 and chimeric Cas9 are distinct
17 inventions, Mot. 3, 10:20–21, 14:14–19, in an effort to support Dr. Seeger’s opinions regarding
18 the designation of claims to the present or proposed counts: Ex. 2454, ¶¶233–34, 237, 240 (citing
19 Ex. 2226 (published 2015)); ¶¶238, 242–43 (Ex. 2201 (published 2013)), (Ex. 2231 (published
20 2013)), (Ex. 2232 (published 2013)); ¶¶255–57 (Ex. 2683 (published 2019)), (Ex. 2654 (published
21 2019)). F12.

22 The post-filing exhibits should be excluded under FRE 401 and 403.

1 **B. Dr. Seeger Provides Irrelevant And Improper Expert Testimony**

2 The Board should also exclude certain testimony of Broad’s expert Dr. Seeger (*i.e.*, Ex.
3 2454, ¶¶166–168, 233–243, 255–57) under FRE 702 and 703 as improper because it is based (1)
4 on material published after the filing date of the patent application in question and therefore not
5 relevant to the question of obviousness at the time of filing and (2) on inadmissible exhibits of the
6 type upon which an expert would not ordinarily rely. Dr. Seeger’s opinions relying on these
7 materials should be excluded under FRE 702(b), (c), and 703 because they apply unreliable
8 principles and methods and use evidence that no expert could have reasonably relied upon in
9 assessing a POSA’s knowledge at the relevant time and demonstration of certain tracrRNA and
10 dual-RNA concepts.

11 **1. Dr. Seeger Improperly Relies On Post-Filing Exhibits**

12 Dr. Seeger’s testimony relies upon several exhibits created or published months or even
13 years after the relevant filing dates of the patent applications in question. Ex. 2454, ¶¶166–68,
14 233, 234, 237–43, 255–57; F13. But expert testimony must be based on sufficient facts and data,
15 Fed. R. Evid. 702(b), and must be the product of reliable principles and methods. Fed. R. Evid.
16 702(c); *see also* Fed. R. Evid. 703 (requiring that evidence is of the kind that “experts in the
17 particular field would reasonably rely” upon “in forming an opinion on the subject”). An expert
18 performing an obviousness analysis, which is used to determine (1) whether a substitute count is
19 appropriate (*i.e.*, whether it contains a single invention) and (2) whether claims properly
20 correspond to the count, is required to view the facts through the lens of a POSA at the time of the
21 relevant patent application filing. An expert’s opinion is therefore not the product of reliable
22 principles and methods when the expert forms his opinion about the state of the art at the relevant
23 time frame by relying on post-filing exhibits. *See Eisai Co. Ltd.*, 533 F.3d at 1359 (“[T]he

1 obviousness inquiry must rely on evidence available ‘at the time’ of the invention.”); *KSR Int’l*
2 *Co.*, 550 U.S.at 420–21.

3 In forming Dr. Seeger’s opinions regarding substituting Broad’s proposed count—
4 particularly the meaning of “guide RNA”—Dr. Seeger had to assess the disclosure of Broad P1
5 from the perspective of a POSA and the general knowledge of the art as of the filing date:
6 December 12, 2012. However, as explained above, Dr. Seeger relies on Exhibit 2217 published
7 after December 12, 2012. *See* Ex. 2454, ¶¶166–68 (citing Ex. 2217). Similarly, Dr. Seeger’s
8 opinions regarding claim designation also rely on exhibits after December 12, 2012. *See* Ex. 2454,
9 ¶¶233, 234, 237–43, 255–57 (citing Exs. 2201, 2226, 2231, 2232, 2654, 2683). F14. Finally, Dr.
10 Seeger also refers without citation to “patent applications filed in . . . 2013,” and “after 2012”—
11 again, post-December 12, 2012—as also supporting his definition of guide RNA. Ex. 2454,
12 ¶¶167–68. F15. Accordingly, Dr. Seeger’s opinions should therefore be excluded under FRE
13 702(b) and (c) and 703 because they are based on unreliable principles and methods and use
14 evidence that no expert could have reasonably relied upon in assessing a POSA’s knowledge at
15 the relevant time.

16 **2. Dr. Seeger Improperly Relies On Unauthenticated And Hearsay**
17 **Exhibits**

18 Under FRE 702 and 703, an expert cannot rely on evidence that other experts in the field
19 would not reasonably rely upon in forming an opinion on the subject. In forming an opinion about
20 obviousness, experts in the field would not rely on unauthenticated and hearsay exhibits about the
21 state of the art. Dr. Seeger improperly relies on the inadmissible exhibits discussed above that are
22 unauthenticated and are inadmissible hearsay when forming his opinions about Broad’s alleged
23 best proofs and claim de-designation. For example, to opine that Dr. Zhang purportedly completed
24 a vector design with tracrRNA, Dr. Seeger relies on unauthenticated Exhibit 2526, which is devoid

1 of any identifying features, has a “Dec. 2, 2020” printed date, and is unsponsored by any witness
2 with personal knowledge. *See* Ex. 2454, ¶¶190, 191 (citing Ex. 2526). F16. As a result, Dr.
3 Seeger’s opinions should be excluded under FRE 702 and 703 because they are based on exhibits
4 that do not, and cannot, provide a POSA with contextual or otherwise sufficient information to
5 form opinions regarding the underlying concepts.

6 Dr. Seeger also relies on several emails between Broad inventors, colleagues, and third
7 parties, which are inadmissible hearsay under FRE 801 and 802. Ex. 2454, ¶¶192, 199, 266, 270
8 (citing Exs. 2704, 2705, 2708, 2750, 2793); F17. Each of the above-identified emails consists of
9 out-of-court statements offered for the supposed truth of the matter asserted—Broad’s experiments
10 allegedly showing successful reduction to practice of dual-molecule CRISPR-Cas9 in a eukaryotic
11 system and that certain claims are separately patentable inventions. F18. As such, each are
12 considered hearsay under FRE 801. Broad’s briefs and declarations establish no hearsay
13 exception, and none are applicable. Dr. Seeger’s opinions that rely on the above hearsay evidence
14 should be excluded under FRE 702 and 703.

15 **II. CONCLUSION**

16 The Board should grant ToolGen’s Miscellaneous Motion and exclude the exhibits
17 identified above, and disregard the portions of Broad’s briefs that rely on them.

18 Respectfully submitted,

19 Dated: October 1, 2021

20 /Timothy J. Heverin/
21 Timothy J. Heverin
22 Reg. No. 77,386
23 JONES DAY
Counsel for Senior Party ToolGen, Inc.

APPENDIX 1: LIST OF EXHIBITS CITED

Ex. No.	Description
1113	ToolGen, Inc. Objections to Junior Party Evidence, served June 7, 2021
2201	Cong et al., Multiplex Genome Engineering Using CRISPR/Cas Systems, 339(6121) <i>Science</i> 819–823 (2013) with Supplemental Material.
2217	Sternberg et al., DNA interrogation by the CRISPR RNA-guided endonuclease Cas9, 507 <i>Nature</i> 62–67 (2014)
2226	Ran et al., In vivo genome editing using <i>Staphylococcus aureus</i> Cas9, 520 <i>Nature</i> 186–191 (2015).
2231	Fonfara et al., Phylogeny of Cas9 determines functional exchangeability of dual-RNA and Cas9 among orthologous type II CRISPR-Cas systems, 42 <i>Nucleic Acids Res.</i> 2577–2590 (2013) and Supplementary Materials.
2232	Chylinski et al., The tracrRNA and Cas9 families of type II CRISPR-Cas immunity systems, 10 <i>RNA Biology</i> 726–737 (2013).
2454	Declaration of Christoph Seeger, executed May 28, 2021
2526	Sequence <i>Streptococcus thermophilus</i> LMD9 CRISPR1 region
2530	Gel image of the surveyor assay for the NTF3 72 hour time point
2533	March 1, 2012 Evernote Record
2535	Image 293F_AAV1GFP_a.pdf
2536	Image 293F_AAV1GFP_b.pdf
2563	Gel image
2565	Picture of Drawing on Whiteboard

Ex. No.	Description
2566	Gel Image
2581	Gel Image
2582	Le Cong Electronic Notebook
2654	Liu, R.M., Liang, L.L., Freed, E. et al. Synthetic chimeric nucleases function for efficient genome editing. Nat Commun 10, 5524 (2019). https://doi.org/10.1038/s41467-019-13500-y
2683	Ma, D., et al. Engineer chimeric Cas9 to expand PAM recognition based on evolutionary information. Nat Commun 10, 560 (2019), https://doi.org/10.1038/s41467-019-08395-8 (Ma 2019)
2704	Email from Martin Jinek to Jennifer Doudna, dated May 8, 2012, 1 page
2705	Email from Aaron Cheng to Jennifer Doudna, dated September 14, 2012, 4 pages
2708	Email from Feng Zhang to Mike Shao, dated August 7, 2011, with 11 page attachment, 12 pages total
2710	Email from Feng Zhang to Shuailiang Lin, dated October 24, 2011, 1 page
2716	Email from Feng Zhang to Kiran Musunuru, David Altshuler, Chad Cowan, and Jennifer Hyne, dated January 7, 2012, with 32 page attachment, 33 pages total
2734	Email from order_confirmation@lifetech.com to Feng Zhang, dated March 5, 2012, with 4 page attachment, 5 pages total
2750	Email from Luciano Marraffini to Feng Zhang, dated June 26, 2012, 3 pages
2751	Email from Feng Zhang to Le Cong, dated June 27, 2012, 1 page
2770	Email from Feng Zhang to Le Cong and Grace Gao, dated July 17, 2012, with 167 page attachment, 168 pages total

Ex. No.	Description
2771	Email from Le Cong to Feng Zhang, dated July 20, 2012, 1 page
2772	Email from Feng Zhang to Le Cong, dated July 20, 2012, with 2 page attachment, 3 pages total
2773	Email from Le Cong to Feng Zhang, dated July 21, 2012, 1 pages
2775	Email from Le Cong to Feng Zhang, dated July 22, 2012, 2 pages
2777	Email from Feng Zhang to Le Cong, dated July 23, 2012, 1 page
2780	Email from Le Cong to Feng Zhang, dated July 29, 2012, 4 pages
2781	Email from dnaseq@genewiz.com to Le Cong, dated July 30, 2012, 3 pages
2782	Email from dnaseq@genewiz.com to Le Cong, dated July 30, 2012, 3 pages
2784	Email from Feng Zhang to Le Cong, dated July 31, 2012, with 1 page attachment, 3 pages total
2793	Email from Le Cong to Feng Zhang, Shuailiang Lin, David Cox, and Michael Yim, dated August 29, 2012, with 20 page attachment, 21 pages total
2829	Email from Le Cong to David Cox, dated July 25, 2012, 2 pages
2830	Email from Le Cong to Feng Zhang, dated July 31, 2012, 2 pages
2842	Email from Grace Gao to Le Cong and Feng Zhang, dated July 25, 2012, 2 pages total
2845	Email from Shuailiang Lin to Neville Sanjana, dated October 26, 2011, 1 page
2922	Gel Image 2012-07-20 22hr 21 min.scn

APPENDIX 2: STATEMENT OF MATERIAL FACTS

ToolGen's Material Facts 1–18

1
2
3 1. ToolGen raised proper and timely objections to the evidence against which it moves. *See*
4 Ex. 1113 (ToolGen's Objections to Junior Party Evidence); 37 C.F.R. § 41.155(b)(1).

5 2. Broad relies on numerous unauthenticated exhibits that are inadmissible for failure to meet
6 the requirements of FRE 901. *See* Mot. 1, 7:11–10:6 (citing Exs. 2526, 2530, 2533, 2535, 2536,
7 2563, 2565, 2566, 2581, 2582, 2922).

8 3. Broad has not offered any evidence that Exhibits 2526, 2530, 2533, 2535, 2536, 2563,
9 2565, 2566, 2581, 2582, and 2922, which Broad contends are their “best proofs” (lab notes,
10 images, and notebook entries), are what Broad claims them to be.

11 4. Exhibit 2526 purports to show a genetic map and sequence of a CRISPR system in a
12 bacterium, and it includes a “Dec. 2, 2020” printed date. *See* Ex. 2526.

13 5. Exhibit 2530 contains only a single annotated red arrow in the middle of the exhibit. There
14 are no dates, labels, or other identifying marks (*e.g.*, molecular ladder or identity of samples in
15 each experimental lane) that typically would be present in such an image of a gel electrophoresis
16 meant to prove the contents of the underlying experiment. *See* Ex. 2530.

17 6. Exhibits 2535, 2536, and 2563, alleged by Broad to show successful single and dual-
18 molecule systems, Mot. 1, Paper 72, 9:6–10:6, are unannotated images without identifying
19 features. *See* Exs. 2535, 2536, and 2563.

20 7. Broad does not offer any sponsoring witness who has personal knowledge of Exhibits
21 2526, 2530, 2533, 2535, 2536, 2563, 2565, 2566, 2581, 2582, and 2922 to verify their authenticity.
22 Dr. Seeger does not profess to have any knowledge of the aforementioned exhibits.

23 8. Broad cites various emails between Broad inventors, colleagues, and third parties, each of

1 which are inadmissible hearsay. *See* Mot. 1, 7:11–9:13 (citing Exs. 2708, 2710, 2716, 2734, 2751,
2 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784, 2829, 2830, 2842, 2845); *see also*
3 Mot. 3, Paper 73, 17:10–13, 18:7–15 (citing Exs. 2704, 2705, 2793).

4 9. Each of the above-identified emails (Exs. 2704, 2705, 2708, 2710, 2716, 2734, 2751, 2770,
5 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784, 2793, 2829, 2830, 2842, 2845) consists of
6 out-of-court statements, which Broad offers to prove that Broad’s experiments allegedly show
7 successful reduction to practice of Broad’s Proposed Count 2.

8 10. Broad has not demonstrated that any exception to the hearsay rules apply to Exhibits 2704,
9 2705, 2708, 2710, 2716, 2734, 2751, 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784,
10 2793, 2829, 2830, 2842, and 2845.

11 11. Broad and Dr. Seeger rely on Exhibit 2217, which was published after December 12, 2012,
12 as allegedly pertaining to the definition of guide RNA. Ex. 2454, ¶¶166–168 (Ex. 2217 (published
13 2014)).

14 12. Broad and Dr. Seeger rely on post-December 12, 2012 Exhibits 2201, 2226, 2231, 2232,
15 2654 and 2683 for the proposition that SaCas9 and chimeric Cas9 are distinct inventions, Mot. 3,
16 10:20–21, 14:14–19, in an effort to support Dr. Seeger’s opinions regarding the designation of
17 claims to the present or proposed counts: Ex. 2454, ¶¶233–34, 237, 240 (citing Ex. 2226 (published
18 2015)); ¶¶238, 242–43 (Ex. 2201 (published 2013)), (Ex. 2231 (published 2013)), (Ex. 2232
19 (published 2013)); ¶¶255–57 (Ex. 2683 (published 2019)), (Ex. 2654 (published 2019)).

20 13. Dr. Seeger’s testimony relies upon several exhibits created or published months or even
21 years after the relevant filing dates of the patent applications in question. Ex. 2454, ¶¶166–168,
22 233, 234, 237–243, 255–57.

23 14. Dr. Seeger relies on numerous exhibits created or published after December 12, 2012. *See*

1 Ex. 2454, ¶¶166–168 (citing Ex. 2217), ¶¶233, 234, 237–243, 255–57 (citing Exs. 2201, 2226,
2 2231, 2232, 2654, 2683).

3 15. Dr. Seeger refers without citation to “patent applications filed in . . . 2013,” and “after
4 2012”— post-December 12, 2012—as also supporting his definition of guide RNA. Ex. 2454,
5 ¶¶167–68.

6 16. To opine that Dr. Zhang purportedly completed a vector design with tracrRNA, Dr. Seeger
7 relies on unauthenticated Exhibit 2526, which is devoid of any identifying features, has a
8 “Dec. 2, 2020” printed date, and is unsponsored by any witness with personal knowledge. *See*,
9 *e.g.*, Ex. 2454, ¶¶190, 191 (citing Ex. 2526).

10 17. Dr. Seeger relies on several emails between Broad inventors, colleagues, and third parties,
11 which are inadmissible hearsay under FRE 801 and 802. Ex. 2454, ¶¶192, 199, 266, 270 (citing
12 Exs. 2704, 2705, 2708, 2750, 2793).

13 18. Exhibits 2704, 2705, 2708, 2750, and 2793 are emails that consist of out-of-court
14 statements offered for the supposed truth of the matter asserted—Broad’s experiments allegedly
15 showing successful reduction to practice of dual-molecule CRISPR-Cas9 in a eukaryotic system
16 and that certain claims are separately patentable inventions.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **TOOLGEN MISCELLANEOUS MOTION 1** was filed via the Interference Web Portal on October 1, 2021 by 8:00 PM EDT, and thereby served on the attorneys of record for the Junior Party pursuant to ¶ 105.3 of the Standing Order. Pursuant to agreement of the parties, service copies are being sent by email by 11:00 pm ET to counsel for Junior Party as follows:

Steven Trybus
Steven.Trybus@lockelord.com

Ray Nimrod
raynimrod@quinnemanuel.com

Ian Ibarra
ianibarra@quinnemanuel.com

Matthew Robson
matthewrobson@quinnemanuel.com

Zach Summers
zachsummers@quinnemanuel.com

Interference106126@lockelord.com

/Timothy J. Heverin/
Timothy J. Heverin
Reg. No. 77,386
JONES DAY
Counsel for Senior Party ToolGen, Inc.