

Filed on behalf of: **Junior Party, Broad**

Paper No. _____

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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,

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,

Junior Party,

v.

TOOLGEN, INC.,
Application 14/685,510,

Senior Party.

Patent Interference No. 106,126 (DK)
(Technology Center 1600)

BROAD OPPOSITION TO TOOLGEN MISCELLANEOUS MOTION 1

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1 **I. PRECISE RELIEF REQUESTED**

2 Broad respectfully requests that the PTAB deny ToolGen, Inc.’s (“ToolGen”)
3 Miscellaneous Motion 1 to exclude evidence.

4 *First*, ToolGen requests that certain exhibits relevant to Broad’s motion to change the
5 Count (Motion 1) be excluded as allegedly unauthenticated or inadmissible hearsay. ToolGen’s
6 motion is based on a misunderstanding of what it means to make a proffer in connection with a
7 motion to change the count. The PTAB is clear that—consistent with traditional procedure—a
8 proffer in connection with a motion to change the count need not be based on admissible evidence,
9 as it is not an attempt to introduce testimony or documents. Rather, a proffer is a demonstration of
10 what a party intends to show at a later point, and thus, it may include unauthenticated or hearsay
11 evidence. To hold otherwise would require a party making a proffer of its best proofs essentially
12 to put forth its priority case, including subjecting authenticating and testifying witnesses to cross-
13 examination before the priority phase. This is not consistent with the law or PTAB practice: “[i]n
14 general submission of a document together with a representation by counsel of what the document
15 shows is a sufficient proffer.” *Byrn v. Aronhime*, Patent Interference 105,384 (McK), Paper 64, at
16 11:24-26 (P.T.A.B. Sept. 20, 2006).

17 Moreover, even if this were not the case, ToolGen does not provide any credible reason
18 why the documents it challenges are not authentic when considered as a whole under Fed. R. Evid.
19 901(b)(4), which provides that evidence may be authenticated by its “appearance, contents,
20 substance, internal patterns, or other distinctive characteristics . . . taken together with all the
21 circumstances.” Indeed, ToolGen does not identify a single credible reason to doubt the
22 authenticity of the challenged documents even when considered in isolation, and Broad’s expert
23 was able to evaluate them as a whole and conclude that they demonstrated Broad’s successful early
24 work with dual-molecule RNA systems.

1 Similarly, ToolGen’s hearsay arguments mistake the purpose of the documents they
2 challenge: these documents are not offered for the truth of the matters asserted, but rather as proof
3 of what they say—which is always admissible.

4 *Second*, ToolGen challenges seven exhibits relevant to Broad’s Motions 1 and 3 as
5 allegedly “irrelevant” under Fed. R. Evid. 401 and 403 because they have dates after the relevant
6 filing dates. Though it is not clear from ToolGen’s motion, these exhibits are relied on by Broad’s
7 expert as relevant to the state of the art, the meaning of terms at the relevant time, and as evidence
8 of secondary considerations of non-obviousness. ToolGen’s motion is again based on a
9 misunderstanding of the law. Federal Circuit precedent is clear that post-filing information, such
10 as testing that shows unexpected results or evidence of commercial success, can be relevant.
11 Moreover, while ToolGen argues these exhibits “will only confuse the issues,” it nowhere explains
12 what the actual risk of confusion is or why the PTAB is not able to give the exhibits proper weight,
13 especially when considered in context.

14 *Finally*, ToolGen challenges the testimony of Broad’s expert Dr. Seeger, despite declining
15 to depose Dr. Seeger when offered. ToolGen contends that Dr. Seeger’s opinion is inappropriate
16 because he cited the same exhibits that ToolGen contends are inadmissible or irrelevant. Because
17 ToolGen’s challenge to those exhibits is ill-founded and should be rejected, ToolGen’s argument
18 regarding Dr. Seeger’s citation of them should likewise be rejected. Moreover, it is well-
19 established that an expert can rely on inadmissible or hearsay evidence if it is the type of material
20 on which experts would reasonably rely. *See* Fed. R. Evid. 703. ToolGen offers only attorney
21 argument that Dr. Seeger’s reliance is not reasonable here, and ToolGen’s failure to cross-examine
22 Dr. Seeger on his reasons for finding the exhibits credible undermines its challenge.

23 For the foregoing reasons and as detailed below, the PTAB should deny ToolGen’s motion.

1 **II. DESCRIPTION OF APPENDICES**

2 Appendix A is a List of Exhibits Cited, Appendix B is the Statement of Material Facts and
3 Broad’s Responses.

4 **III. ARGUMENT**

5 **A. ToolGen Fails to Show That Any Of The Evidence Proffered By Broad**
6 **Should Be Excluded**

7 At 1:13-3:12, ToolGen argues that certain exhibits Broad cited as part of its proffer of best
8 proofs in connection with Broad Motion 1 should be excluded for failure to authenticate them and
9 as hearsay. ToolGen Miscellaneous Motion 1 (“Mot.”). The response is that these exhibits are
10 admissible as part of Broad’s *proffer*—a demonstration of what Broad *later intends to prove* at the
11 priority phase should the Count be changed—showing how Count 1 must be broadened because it
12 excludes Broad’s best and earliest proofs relating to dual-molecule RNA work. The materials were
13 proffered to demonstrate that Count 1 unfairly prevents Broad from relying on these proofs. The
14 PTAB has expressly held in the context of deciding motions to change the Count that “[a] proffer
15 does not have to be ‘admissible’ evidence” and “any proffer is not an attempt to introduce
16 testimony or documents in evidence.” *Byrn*, Paper 64 at 12:17-20; *see also Rabbani v. Notomi*,
17 *Interference* 105,427—(McK), 2008 WL 2259956, at *7 (B.P.A.I. Jan. 25, 2008) (“[T]he Board
18 authorized Rabbani to file a motion to proffer what any declaration testimony would be. No
19 declaration may accompany the motion, just a proffer by counsel.”); *Univ. of S. California v.*
20 *DePuy Spine, Inc.*, 473 Fed. Appx. 893, 895 (Fed. Cir. 2012) (relying on proffer from counsel).
21 ToolGen’s arguments should be rejected.

22 **1. The Exhibits ToolGen Challenges Under FRE 901 Are Properly**
23 **Considered As Part Of Broad’s Proffer And Should Not Be Excluded**

24 At 1:18-2:22, ToolGen argues that eleven exhibits that are part of Broad’s proffer in Motion
25 1 should be excluded as unauthenticated under FRE 901. Mot. 1. The response is, first, that

1 ToolGen misunderstands what a proffer is. “In general submission of a document together with a
2 representation by counsel of what the document shows is a sufficient proffer.” *Byrn*, Paper 64, at
3 11:24-26. “A proffer does not mean ‘prove priority,’” and “[a] proffer does not seek to have
4 proffered material ‘received in evidence.’” *Id.* at 11:17-18. Instead, “a proffer means offer to the
5 Board and the opponent sufficient information that (1) the opponent may decide whether and how
6 to oppose and (2) the Board can evaluate the respective positions of the parties.” *Id.* at 11:18-21.
7 Thus, the PTAB has held in evaluating a proffer made in connection with a motion to change the
8 count—as here—that “[a] proffer does not have to be ‘admissible’ evidence.” *Id.* at 17-18.

9 ToolGen’s motion should be denied for the additional reason that its arguments are
10 unworkable from a policy perspective. A proffer can take many forms. *See Byrn*, Paper 64 at 11:22-
11 26. According to ToolGen, however, the authors of each and every exhibit used in a proffer must
12 provide a declaration authenticating the exhibit or providing the alleged “hearsay” testimony—
13 thus, subjecting them to cross-examination ahead of the priority phase. That is not, and has never
14 been, the protocol for proffers on best proofs in support of a motion to change the count, and it
15 would turn the early phase of an interference into a burdensome mini-trial on priority before
16 matters regarding the count have been resolved. Notably, ToolGen does not cite a single case or
17 other authority endorsing this procedure or suggesting that proffered evidence must be
18 authenticated.

19 Additionally, even though it is unnecessary, the exhibits themselves can be authenticated
20 under Fed. R. Evid. 901 when considered “with all the circumstances,” as they must be under Fed.
21 R. Evid. 901(b)(4). As ToolGen notes, evidence “may be authenticated by its “appearance,
22 contents, substance, internal patterns, or other distinctive characteristics . . . taken together with all

1 the circumstances.” Fed. R. Evid. 901(b)(4). Here, taken together with all of the circumstances,
2 the exhibits are clearly authentic and admissible.

3 Indeed, of the eleven exhibits, ToolGen only actually challenges five. ToolGen focuses on
4 them individually; but, taken together with other exhibits such as dated manuscripts and emails
5 showing the relied upon work, the exhibits are part of an overwhelming proffer showing that
6 Broad’s earliest work on CRISPR-Cas9 systems in eukaryotic cells—and best proofs on the
7 interfering eukaryotic subject matter—date to 2011 and involved dual-molecule RNA
8 experiments. Ex. 2454, Seeger Decl. ¶¶ 184-99. Indeed, Dr. Seeger was able to consider the
9 evidence as a whole and determine that, if offered at a priority phase, the evidence would show
10 Broad’s successful early dual-molecule work. Ex. 2454, Seeger Decl. ¶¶ 184-99. ToolGen does
11 not offer contrary testimony in support of its motion.

12 Moreover, as to the five exhibits discussed by ToolGen, none of ToolGen’s arguments
13 actually go to authenticity, and ToolGen fails to consider the exhibits in the broader context of
14 Broad’s proffer. At 2:5-7, ToolGen argues that Exhibit 2526 “shows a genetic map and sequence
15 of a CRISPR system in a bacterium [and] it includes a ‘December 2, 2020’ printed date...
16 demonstrating the need for authentication.” Mot. 1. But the explanation for this date (which
17 appears in the footer, stating it was “Printed from SnapGene®: Wednesday, Dec 2, 2020 2:18
18 PM”) is straightforward (as ToolGen surely understands)—the genetic map in question was kept
19 as an electronic file and was printed to PDF from the computer program SnapGene for use in these
20 Interference proceedings on that date. The indication an electronic file was printed to PDF does
21 not render it inadmissible under Fed. R. Evid. 901.

22 Similarly, as to Exhibits 2530, 2535, 2536, and 2563, at 2:8-18 ToolGen argues that these
23 are “unannotated images,” that there should be “dates, labels, or other identifying marks... that

1 typically would be present,” and that without the information, these documents would not allow a
2 POSA “to understand the alleged experiment[s].” Mot. 1. But Dr. Seeger was easily able to
3 understand and opine on what these exhibits showed (Ex. 2454, Seeger Decl. ¶¶ 184-99)—and
4 tellingly, ToolGen declined to depose Dr. Seeger, and does not cite testimony from an expert
5 contradicting him in support of its motion. As to the lack of annotations, that does not render the
6 images inauthentic—that is simply how they authentically exist. ToolGen’s attorney argument
7 about what the exhibits “should” show does not render them inadmissible—it is pure speculation.

8 **2. The Exhibits ToolGen Challenges As Hearsay Are Properly**
9 **Considered As Part Of Broad’s Proffer And Should Not Be Excluded**

10 At 3:2-12, ToolGen challenges 22 exhibits, arguing that they are “various emails between
11 Broad inventors, colleagues, and third parties, each of which are inadmissible hearsay.” Mot. 1.
12 *First, Bryn* addresses the exact argument that ToolGen raises here—attempting to exclude as
13 hearsay exhibits used as part of a proffer for a motion to change the count. *Bryn*, Paper 64, at 9:1-
14 16. But the PTAB held unequivocally that “[a] proffer does not have to be ‘admissible’ evidence,”
15 because “any proffer is not an attempt to introduce testimony or documents in evidence.” *Id.* at
16 12:17-20. Here, as in *Bryn*, the evidence challenged is part of the proffer demonstrating that the
17 proponent’s (Broad’s) best proofs fall outside of the count.

18 *Second*, ToolGen does not provide any argument actually attempting to show these
19 documents are hearsay. None of these exhibits are being offered for the truth of the matters
20 asserted, *but as proof of what they say*, as part of Broad’s proffer. They are each admissible as
21 such—like any other document. *See Rozbicki v. Chiang*, Interference. 105,898, Paper 154 at 25
22 (PTAB June 26, 2013) (explaining that a document is always “admissible as proof of what it says”).

23 *Finally*, even if they were hearsay (they are not) these documents may be admitted within
24 Fed. R. Evid. 807’s residual exception to hearsay. There is no reason to believe the statements in

1 these documents are not accurate—indeed, ToolGen did not request that any of the “inventors,
2 colleagues, and third parties” be made available for deposition. The PTAB has frequently accepted
3 materials actually offered for the truth of the matters asserted (unlike these) and noted its ability
4 to give challenged out-of-court statements appropriate weight. *See Praxair Distrib., Inc. v. INO*
5 *Therapeutics LLC*, IPR2015-00529, Paper 33 at 2 (PTAB Dec. 22, 2015) (denying Petitioner’s
6 request to depose the authors of declarations, noting PTAB could appropriately determine weight);
7 *Mexichem Amanco Holdings S.A. de C.V. v. Honeywell Int’l, Inc.*, Case IPR2013-00576, Paper 36
8 at 2 (PTAB Sept. 5, 2014) (same). There is no reason it cannot do so here.

9 **B. The “Post-Filing” Exhibits That ToolGen Challenges Are Relevant And**
10 **Properly Considered**

11 At 3:16-4:22, ToolGen challenges seven exhibits relevant to Broad’s Motions 1 and 3 as
12 “irrelevant” under Fed. R. Evid. 401 and 403. Mot. 1. Though it is not made clear in ToolGen’s
13 motion, these exhibits are relied on by Broad’s expert regarding the meaning of terms at the
14 relevant time and as evidence of state of the art/secondary considerations of non-obviousness.
15 ToolGen claims these exhibits “will only confuse the issues,” though it nowhere explains any
16 actual risk of confusion.

17 The response is that, first, ToolGen is incorrect about the law regarding materials that post-
18 date a relevant filing date. ToolGen claims “[p]ost-filing exhibits say nothing about the state of the
19 art or the knowledge of a POSA at the relevant time,” (Mot. 1 at 4:9-12), but the Federal Circuit
20 has expressly held to the contrary. For instance, at 4:15-21, ToolGen challenges exhibits relied on
21 by Broad, such as test results for SaCas9, that were created after the patent issued and are relevant
22 to non-obviousness and secondary considerations. *Id.* The Federal Circuit has expressly held that
23 such evidence can be relevant and reliable—directly contrary to ToolGen’s position here. *Knoll*
24 *Pharm. Co., Inc. v. Teva Pharm. USA, Inc.*, 367 F.3d 1381, 1385 (Fed. Cir. 2004) (“Evidence

1 developed after the patent grant is not excluded from consideration, for understanding of the full
2 range of an invention is not always achieved at the time of filing the patent application.”); *Sanofi-*
3 *Aventis Deutschland GmbH v. Glenmark Pharm. Inc., USA*, 748 F.3d 1354, 1360 (Fed. Cir. 2014)
4 (“Glenmark also argues that later-discovered benefits cannot be considered in an obviousness
5 analysis.... That is incorrect; patentability may consider all of the characteristics possessed by the
6 claimed invention, whenever those characteristics become manifest.”).

7 Similarly, at 4:13-15, ToolGen focuses on Exhibit 2217, which pertains to the definition
8 of guide RNA. Mot. 1. The Federal Circuit has expressly relied on similar post-filing evidence as
9 relevant to plain meaning, holding such evidence need not be contemporaneous, and ToolGen
10 identifies no reason why the evidence it seeks to exclude is not credible based on the date. *See*,
11 *e.g., ASM Am., Inc. v. Genus, Inc.*, 401 F.3d 1340, 1347 (Fed.Cir.2005) (concluding that extrinsic
12 evidence that post-dated the patent filing date nonetheless was helpful in determining how a
13 person of ordinary skill in the art would have understood the claim term at the time it was filed);
14 *Butamax(TM) Advanced Biofuels LLC v. Gevo, Inc.*, 746 F.3d 1302, 1309-12 (Fed. Cir. 2014)
15 (relying on post-filing extrinsic evidence to reject contention that patentee implicitly narrowly
16 defined disputed term) (vacated on other grounds); *Application of Glass*, 492 F.2d 1228, 1232
17 n.6 (C.C.P.A. 1974) (“Of course, while later issuing patents or publications may not be relied
18 upon to establish the specification is enabling under § 112, paragraph one, reference may be
19 made to such publication to construe claim language....”). Exhibit 2217 is a publication from
20 March 2014 in *Nature* demonstrating that the definition of “guide RNA” is not limited to single-
21 guide RNA. ToolGen points to no reason why the plain meaning of the term would have changed
22 so quickly from late 2012 to early 2014, and thus, no reason why Exhibit 2217 is not reliable on
23 this point.

1 Finally, ToolGen has not articulated any basis for its claim that these exhibits will “only
2 confuse the issues under FRE 403.” The PTAB is more than capable of evaluating these materials
3 and properly weighing them.

4 **C. Dr. Seeger’s Testimony Is Relevant, Proper, And Reliable**

5 At 5:2-7:14, ToolGen contends that Dr. Seeger’s opinion is inappropriate because he cited
6 exhibits that ToolGen contends are inadmissible or irrelevant. Mot. 1. Specifically, ToolGen asks
7 the PTAB to exclude 17 paragraphs from Broad’s expert, Dr. Seeger, under Fed. R. Evid. 702 and
8 703, because he cites “material published after the filing date of the patent application in question”
9 and cites allegedly “inadmissible exhibits of the type upon which an expert would not ordinarily
10 rely.” Mot. 1 at 5:2-6. ToolGen’s motion should be rejected because experts can rely on hearsay
11 and inadmissible evidence in forming their opinions “[i]f experts in the particular field would
12 reasonably rely on those kinds of facts or data in forming an opinion on the subject.” Fed. R. Evid.
13 703. Tellingly, ToolGen declined to depose Dr. Seeger and does not cite to or offer any testimony
14 that other experts would not reasonably rely on the materials Dr. Seeger has here.

15 Moreover, because ToolGen’s underlying challenge to those exhibits is ill-founded and
16 should be rejected, ToolGen’s motion regarding Dr. Seeger should also be rejected for the same
17 reasons discussed in Sections III.A and B above.

18 **1. Dr. Seeger’s Testimony Regarding “Post-Filing” Exhibits Is Relevant**
19 **And Proper**

20 At 5:12-6:15, ToolGen argues that Dr. Seeger’s testimony should be excluded because it
21 “relies upon several exhibits created or published months or even years after the relevant filing
22 dates of the patent applications in question.” Mot. 1. Broad addressed why these exhibits are
23 relevant and reliable above, in Section III.B. For those same reasons, Dr. Seeger properly
24 considered them here.

1 Additionally, while ToolGen claims that Dr. Seeger’s opinions are “based on unreliable
2 principles and methods and use evidence that no expert could have reasonably relied upon in
3 assessing a POSA’s knowledge at the relevant time” (Mot. 1. at 6:12-15), ToolGen never actually
4 deposed Dr. Seeger—despite Dr. Seeger being offered for deposition—to test why he found these
5 materials credible evidence relating to obviousness, secondary considerations, and plain meaning.
6 And ToolGen offers only attorney argument that “no expert” would rely on the materials Dr.
7 Seeger did. ToolGen does not cite or rely on any contrary expert testimony or other evidence
8 suggesting Dr. Seeger’s opinion is inappropriate. ToolGen’s motion fails for this reason as well.

9 **2. Dr. Seeger’s Testimony Regarding Other Challenged Exhibits Is**
10 **Proper**

11 At 6:18-7:14, ToolGen argues that Dr. Seeger’s testimony should be excluded because he
12 considered materials ToolGen contends are “unauthenticated and hearsay exhibits.” Mot. 1. Broad
13 addressed why these exhibits are relevant and reliable above, in Section III.A. For those same
14 reasons, Dr. Seeger properly considered them here.

15 Additionally, the Federal Rules of Evidence specifically allow for expert witnesses to rely
16 on hearsay “[i]f experts in the particular field would reasonably rely on those kinds of facts or data
17 in forming an opinion on the subject.” Fed. R. Evid. 703. As noted above, ToolGen declined to
18 depose Dr. Seeger and again offers only attorney argument that “no expert” would rely on the
19 materials Dr. Seeger did. That is insufficient. Additionally, ToolGen’s argument that no expert
20 would rely on unauthenticated or hearsay material is further undermined by expert testimony
21 offered by other parties in related interferences. For instance, CVC made a proffer in the 048
22 Interference with Broad in which its expert relied on an unauthenticated laboratory notebook in
23 the same manner as Dr. Seeger here. *See* Ex. 2406, 048 Interference, Greider Decl. ¶ 165 (“I have
24 been informed by counsel that Ex. 1507 is a copy of pages from a laboratory notebook maintained

1 by Senior Party co-inventor Martin Jinek that is dated prior to the filing of Senior Party’s First
2 Provisional Application. I have reviewed Ex. 1507 [Ex. 2123] and in my opinion, these pages
3 demonstrate a record of an experiment that meets all of the requirements of Proposed Count 2....”);
4 Ex. 2407, 048 Interference, Carroll Decl. ¶ 157.

5 Experts routinely rely on the types of materials Dr. Seeger has relied on in this Interference
6 when opining on a party’s proffer. ToolGen’s motion fails for this reason as well.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Broad respectfully requests that the PTAB deny ToolGen’s
9 Miscellaneous Motion 1 to exclude evidence.

10 Dated: October 8, 2021

Respectfully submitted,

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APPENDIX A: LIST OF EXHIBITS CITED

EX.	DESCRIPTION
2123	[REDACTED] Martin Jinek notebook, pages 84-86, Ex. 1507, Interference 106,048
2217	Sternberg et al., <i>DNA interrogation by the CRISPR RNA-guided endonuclease Cas9</i> , 507 Nature 62-78 (2014).
2406	Declaration of Carol Greider, Ph.D., Interference 106,048, dated May 23, 2016.
2407	Declaration of Dana Carroll, Ph.D., Interference 106,048, dated May 23, 2016.
2454	Declaration of Christoph Seeger, executed May 28, 2021.
2526	Sequence Streptococcus thermophilus LMD9 CRISPR1 region
2530	Gel image of the surveyor assay for the NTF3 72 hour time point
2535	Image 293F_AAV1GFP_a.pdf
2536	Image 293F_AAV1GFP_b.pdf
2563	Gel image

1 **APPENDIX B: BROAD’S RESPONSE TO STATEMENT OF MATERIAL FACTS**

2 **Broad’s Responses to ToolGen’s Material Facts 1–18**

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

5 **RESPONSE:** Denied.

6 2. Broad relies on numerous unauthenticated exhibits that are inadmissible for failure to
7 meet the requirements of FRE 901. See Mot. 1, 7:11–10:6 (citing Exs. 2526, 2530, 2533, 2535,
8 2536, 2563, 2565, 2566, 2581, 2582, 2922).

9 **RESPONSE:** Denied.

10 3. Broad has not offered any evidence that Exhibits 2526, 2530, 2533, 2535, 2536, 2563,
11 2565, 2566, 2581, 2582, and 2922, which Broad contends are their “best proofs” (lab notes,
12 images, and notebook entries), are what Broad claims them to be.

13 **RESPONSE:** Denied.

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

16 **RESPONSE:** Denied.

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

21 **RESPONSE:** Denied.

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

4 **RESPONSE:** Denied.

5 7. Broad does not offer any sponsoring witness who has personal knowledge of Exhibits
6 2526, 2530, 2533, 2535, 2536, 2563, 2565, 2566, 2581, 2582, and 2922 to verify their
7 authenticity. Dr. Seeger does not profess to have any knowledge of the aforementioned exhibits.

8 **RESPONSE:** Denied.

9 8. Broad cites various emails between Broad inventors, colleagues, and third parties, each of
10 Interference No. 106,126 which are inadmissible hearsay. *See* Mot. 1, 7:11–9:13 (citing Exs.
11 2708, 2710, 2716, 2734, 2751, 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784,
12 2829, 2830, 2842, 2845); see also Mot. 3, Paper 73, 17:10–13, 18:7–15 (citing Exs. 2704, 2705,
13 2793).

14 **RESPONSE:** Denied.

15 9. Each of the above-identified emails (Exs. 2704, 2705, 2708, 2710, 2716, 2734, 2751,
16 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781, 2782, 2784, 2793, 2829, 2830, 2842, 2845)
17 consists of out-of-court statements, which Broad offers to prove that Broad’s experiments
18 allegedly show successful reduction to practice of Broad’s Proposed Count 2.

19 **RESPONSE:** Denied.

20 10. Broad has not demonstrated that any exception to the hearsay rules apply to Exhibits
21 2704, 2705, 2708, 2710, 2716, 2734, 2751, 2770, 2771, 2772, 2773, 2775, 2777, 2780, 2781,
22 2782, 2784, 2793, 2829, 2830, 2842, and 2845.

23 **RESPONSE:** Denied.

1 11. Broad and Dr. Seeger rely on Exhibit 2217, which was published after December 12,
2 2012, as allegedly pertaining to the definition of guide RNA. Ex. 2454, ¶¶166–168 (Ex. 2217
3 (published 2014)).

4 **RESPONSE:** Denied.

5 12. Broad and Dr. Seeger rely on post-December 12, 2012 Exhibits 2201, 2226, 2231, 2232,
6 2654 and 2683 for the proposition that SaCas9 and chimeric Cas9 are distinct inventions, Mot. 3,
7 10:20–21, 14:14–19, in an effort to support Dr. Seeger’s opinions regarding the designation of
8 claims to the present or proposed counts: Ex. 2454, ¶¶233–34, 237, 240 (citing Ex. 2226
9 (published 2015)); ¶¶238, 242–43 (Ex. 2201 (published 2013)), (Ex. 2231 (published 2013)),
10 (Ex. 2232 (published 2013)); ¶¶255–57 (Ex. 2683 (published 2019)), (Ex. 2654 (published
11 2019)).

12 **RESPONSE:** Denied.

13 13. Dr. Seeger’s testimony relies upon several exhibits created or published months or even
14 years after the relevant filing dates of the patent applications in question. Ex. 2454, ¶¶166–168,
15 21 233, 234, 237–243, 255–57.

16 **RESPONSE:** Denied.

17 14. Dr. Seeger relies on numerous exhibits created or published after December 12, 2012. *See*
18 Interference No. 106,126 Ex. 2454, ¶¶166–168 (citing Ex. 2217), ¶¶233, 234, 237–243, 255–57
19 (citing Exs. 2201, 2226, 2231, 2232, 2654, 2683).

20 **RESPONSE:** Denied.

21 15. Dr. Seeger refers without citation to “patent applications filed in . . . 2013,” and “after
22 2012”— post-December 12, 2012—as also supporting his definition of guide RNA. Ex. 2454,
23 ¶¶167–68.

1 **RESPONSE:** Denied.

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

6 **RESPONSE:** Denied.

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

10 **RESPONSE:** Denied.

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

15 **RESPONSE:** Denied.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 8, 2021, a true and complete copy of the foregoing **BROAD OPPOSITION TO TOOLGEN MISCELLANEOUS MOTION 1** is being filed and served by 5:00 pm PT /8:00 pm ET via the Interference Web Portal and by agreement served by email on the Senior Party by 8:00 pm PT / 11:00 pm ET to:

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